

JANUARY 1983  
Volume 5  
No. 1

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## Commission Decisions



The following case was Directed for Review during the month of January

Secretary of Labor on behalf of Phillip Cameron v. Consolidation Coal Company, Docket No. WEVA 82-190-D. (Judge Merlin, December 13, 1982)

Review was Denied in the following cases during the month of January

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. PENN 82-208(a). (Judge Melick, December 1, 1982)

Secretary of Labor, MSHA v. Allied Chemical Corporation, Docket No. PENN 82-208(b). (Judge Kennedy, December 6, 1982)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket Nos. PENN 82-66-R, 82-109, 82-184. (Judge Broderick, December 6, 1982)

Secretary of Labor, MSHA v. Southwestern Illinois Coal Corporation, Docket No. LAKE 82-38. (Interlocutory Review of December 16, 1982 Order of Judgment)

William Haro v. Magma Copper Company, Docket No. WEST 81-365-DM. (Judge Kennedy, November 1, 1982)



v.

Docket No. WEST 81-109-DM

IMCO SERVICES

ORDER

On December 15, 1982, the Commission issued its decision in this case affirming the administrative law judge's dismissal of Joseph W. Herman's discrimination complaint as untimely filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On January 18, 1983, we received a document filed by Mr. Herman. We construe the document to be a request for reconsideration of the Commission's decision. 29 C.F.R. § 2700.75. We find no merit in the request and, accordingly, it is denied.

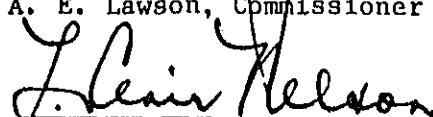
We note Mr. Herman's request for "an appeal ... to the next judicial court available to me." We can take no action regarding this request. If complainant desires to appeal the Commission's decision to a United States Court of Appeals, the appropriate procedures set forth in section 106(a)(1) of the Act (30 U.S.C. § 816(a)(1)) and the Federal Rules of Appellate Procedure must be followed by him.

  
Rosemary M. Collyer, Chairman

  
Richard V. Backley, Commissioner

  
Frank F. Jersfal, Commissioner

  
A. E. Lawson, Commissioner

  
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SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

UNITED STATES STEEL CORPORATION

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:  
:  
:  
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:  
:

Docket No. KENT 81-136

### DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the surface coal standard, 30 C.F.R. 77.1605(k). The standard states that "[b]erms or guards shall be provided on the outer bank of elevated roadways." 1/ In granting summary decision for United States Steel Corporation, the administrative law judge concluded that the standard was unconstitutionally vague and therefore, unenforceable. 2/ For the reasons discussed below, we reverse and remand for further proceedings.

Following an inspection of U.S. Steel's No. 32 Mine in Lynch, Kentucky, an MSHA inspector issued a citation alleging that the company violated section 77.1605(k) by failing to install appropriate berms or guards at three areas along a mine roadway. At one location, the inspector observed a guard dislodged for a distance of 29 feet. At one of the other two cited locations there was a berm 6 to 8 inches high and 2 feet long, and at the remaining location there was a berm 16 inches high and 29 feet long. The inspector noted on the citation that the height of these berms was less than 22 inches, the axle height of what the inspector believed was the largest vehicle using the roadway, a Pettibone tractor. The relevant MSHA inspector's manual contains a policy providing that under section 77.1605(k) berms "shall be at

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1/ "Berm" is defined in 30 C.F.R. § 77.2(d) as "a pile or mound of material capable of restraining a vehicle."

2/ The judge's decision is reported at 4 FMSHRC 563 (April 1982) (ALJ

At the hearing before the administrative law judge, the parties filed a joint stipulation in which they agreed that the citation that there were berms along the roadway except where the guard was dislodged. U.S. Steel claimed in the stipulation that it was the guard when the citation was issued. The parties filed cross-motions for summary decision.

The judge concluded that "the language of section 77.1605 is so vague and ambiguous as to render [the standard] unenforceable." 4 FMSHRC at 571. The judge also held that the Surface Manual on mid-axle height, which he found formed the basis of the citation, was not part of the standard and could not be applied as though it was. 4 FMSHRC at 570-71. The judge accordingly vacated the citation and directed review sua sponte. 30 U.S.C. § 813(d)(2)(B). The issues are the constitutional validity of the standard and the enforceability of the MSHA Surface Manual guidelines.

We first address the question of whether section 77.1605 is unconstitutionally vague. 4/ This standard is not detailed but we have observed previously in a similar context, "[m]any standards should be 'simple and brief in order to be broadly adaptable to myriad circumstances.'" Alabama By-Products Corp., infra, slip op. at 10, quoting from Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1977). Nevertheless, such broad standards must afford reasonable notice of what is required or proscribed. As we stated in Alabama By-Products Corp.,

In order to pass constitutional muster, a statute or regulation establishing a standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and

3/ MSHA, Coal Mine Health and Safety Inspection Manual For Underground Coal Mines and Surface Work Areas of Underground Coal Mines, at 11-12 ("the Surface Manual"). The Surface Manual is Chapter III of the Inspection and Investigation Manual, Federal Mine Safety and Health Administration, 1977 (1978) ("the Inspection Manual"). The "Introduction," at 1-1, states that the primary purpose of the Inspection Manual is to provide inspection personnel with "definite guidelines" to aid them in their duties.

4/ We reject the Secretary's contention that the Commission lacks authority to pass upon the constitutional soundness of this standard. The standard was promulgated under the 1969 Coal Act, and we have previously held that challenges to the validity of a Coal Act standard are within the Commission's jurisdiction.

slip op. at 2. We resolved a vagueness challenge in Alabama By-Products interpreting the standard at issue in light of a "reasonably prudent person" test (slip op. at 2-3), and we adopt the same approach in the present case.

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See Alabama By-Products, supra. See also Voegele Company, Inc. v. NRC, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). 5/ The definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." 6/

Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person could do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway. In sum, we hold that section 77.1605(k), as construed herein, is not unconstitutionally vague and that it is therefore an enforceable standard. 7/

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On review the Secretary now proposes a similar test for judging the adequacy of a berm or guard. Brief for Sec'y at 14-16.

"Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

The Secretary is privileged under the Mine Act to write a more specific berm standard setting forth more detailed specifications for construction of safe berms and guards.

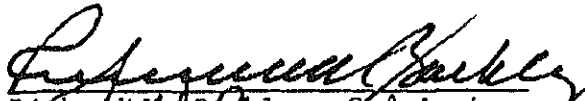
standards. See Alabama By-Products, supra, slip op. at 5; Kin  
Coal Co., Inc., 3 FMSHRC 1417, 1419-23 (June 1981); Old Ben Co  
2 FMSHRC 2806, 2809 (October 1980). Reliance on the mid-axle  
without more, does not necessarily establish the berm or guard  
reasonably prudent person would have constructed under the cir  
If the Secretary believes that a berm of mid-axle height is in  
a reasonable person would provide in a particular case, the Se  
must prove that by a preponderance of credible evidence. We t  
in result the judge's determination that the Secretary was not  
to summary decision on the basis of his internal guideline also

Under our rules, a motion for summary decision may be gra  
if the entire record shows no genuine issue of material fact a  
moving party is entitled to a decision as a matter of law. 29  
§ 2700.64(b). Having found the standard invalid, the judge di  
determine all factual issues necessary to a decision in this c  
have concluded above that the standard is valid, and our review  
record indicates to us that material factual issues remain to  
before it can be determined whether a violation occurred.

To prove the allegation of "inadequate" berms requires ev  
to what type of berm or guard a reasonably prudent person woul  
under the circumstances. With respect to the area where the g  
dislodged, a prima facie case of violation may have been estab  
the judge must make findings as to whether the guard was actual  
and whether U.S. Steel established a valid defense in its cla  
guard was being replaced. 8/ Without this kind of evidence an  
findings, the entry of summary decision was inappropriate. Ac  
we remand this proceeding in order to afford the parties the o  
to present any additional evidence and argument with respect t  
violation in accordance with the principles set forth above.

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8/ We express no view at this time on the viability of U.S.  
asserted defense to this aspect of the citation.

  
Richard V. Backley, Commissioner

  
Frank E. Jestrab, Commissioner

  
A. E. Lawson, Commissioner

  
L. Clair Nelson, Commissioner

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MAGMA COPPER COMPANY

ORDER

William A. Haro has petitioned for discretionary review pro se a decision of an administrative law judge issued on November 1, 1982. Magma Copper has filed a motion requesting that the petition be dismissed as untimely. For the reasons that follow, the petition is dismissed as untimely.

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 seq., provides that "any person adversely affected or aggrieved by decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." 30 U.S.C. § 823(d)(2)(A) (emphasis added). Rules 5(d) and 70(a) of the Commission's rules of procedure provide that "filing of a petition for discretionary review is effective only upon receipt." 29 C.F.R. §§ 2700.5(d), 70(a). The decision of the administrative law judge becomes the final decision of the Commission 40 days after its issuance unless the Commission has directed review of the decision during that period. 30 U.S.C. § 823(d)(1).

The administrative law judge's decision in this case was issued on November 1, 1982. The fortieth day following the issuance of the judge's decision was December 11, 1982. The petition for discretionary review was not mailed until December 22, 1982. It was not received, and therefore filed, at the Commission until December 27, 1982, fifty-six days after the issuance of the judge's decision. Accordingly, the petition for discretionary review was not filed until after the decision of the judge became a final order of the Commission by operation of law. 30 U.S.C. § 823(d)(1).

In the petition, Haro states that he first learned of the judge's decision on December 6, 1982, and that the attorney who represented him in the proceedings before the judge can confirm the date of his notification of the judge's decision. Haro also states that the attorney did not petition for review of the judge's decision because of a potential conflict of interest with Magma Copper Company. We construe these

of the petition against the standards set forth in Fed. R. Civ. P. 60(b)(1). 1/ Boone v. Rebel Coal Company, 4 FMSHRC 1232 (1982). Moore's Federal Practice § 60.22[2]; 11 Wright & Miller, Federal Practice and Procedure § 2858. Even if Haro's assertion that he first learned of the decision on December 6 is accepted as fact, Haro has made any representations that his late receipt of the decision was due to factors outside of his control or that of his attorney. The potential conflict of interest that allegedly prevented Haro's attorney, who represented him at the hearing and filed a post-hearing brief on his behalf, from filing a petition with the Commission is not explained in view of the extraordinary nature of reopening final judgments, lack of sufficient information substantiating a request for relief can be made to such claims. 7 Moore's at § 60.22[2], p. 257. Moreover, Haro waited more than two weeks after December 6 to prepare and mail a petition of five paragraphs in length. This delay does not demonstrate diligence under the circumstances. Haro has had two previous cases before the Commission and should be familiar with its procedures. 2/

1/ Fed. R. Civ. P. 60(b)(1) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or decree for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....

2/ The present situation is not analogous to that involved in Duval Corp. v. Donovan & FMSHRC, 650 F.2d 1051 (9th Cir. 1981). In Duval, the operator's petition for discretionary review was filed on the third day after the first day after the issuance of the administrative law judge's decision. Thus, although the petition for review was untimely filed under the Commission's rules, the judge's decision had not become a final order of the Commission because 40 days had not passed since its issuance. 30 U.S.C. § 823(d)(1). In a Duval situation, the inquiry is whether there is a good cause for the untimely filing has been established. Valley River & Sand Corp., WEST80-3-M (March 29, 1982); McCoy v. Crescent Coal Co., FMSHRC 1202 (June 1980). In the present case, however, the judge's decision became a final order of the Commission and, therefore, the request for relief is appropriately addressed under Fed. R. Civ. P. 60(b).

*Frederick S. Paul*  
Richard M. Mackley, Commissioner

*Frank F. Jessup*  
Frank F. Jessup, Commissioner

*A. E. Lawson*  
A. E. Lawson, Commissioner

*L. Clair Nelson*  
L. Clair Nelson, Commissioner



This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), involves the interpretation and application of 30 C.F.R. § 56.4-35. The cited standard provides:

Mandatory. Before any heat is applied to pipelines or containers which have contained flammable or combustible substances, they shall be drained, ventilated, thoroughly cleaned of residual substances and filled with either an inert gas or, where compatible, filled with water.

An administrative law judge concluded that A. H. Smith Stone Company ("Smith") violated the standard and assessed a \$1,000 penalty. 1/ For the following reasons, we affirm the judge's decision.

On November 24, 1980, an accident occurred at Smith's Culpeper, Virginia crushed stone operation, when a miner attempted to cut with a cutting torch a used 55-gallon oil drum. The drum exploded and the employee was critically injured. After an investigation of the accident, the Mine Safety and Health Administration issued a citation charging a violation of the standard for a failure to have the drum purged of flammable substances before heat was applied to it.

Used drums that had contained flammable substances, such as fuel, lubricants, or antifreeze, were customarily stored at Smith's Culpeper plant behind a company trailer. The used drums were returned for credit towards purchase of full barrels, and were picked up at the plant for that purpose by the distributor. Some drums were kept at the plant for re-use as trash barrels or as storage drums for fuel or lubricants. When a drum was to be re-used as a trash receptacle, Smith would have its employees cut off the drum top with a torch on company

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The judge's decision is reported at 3 FMSHRC 2927 (December 1981) (A

the employee did not explain the reason for his request, the superintendent assumed that he wanted the drum for his personal use at 2931-32; Tr. 83-86. 3/ The superintendent gave the employee to take the drum. The employee then obtained from a fellow miner a torch for cutting the drum, but he did not remove the plug or purged the drum before using the torch. The drum exploded when he applied the torch to it and he received fatal injuries. A subsequent investigation revealed that a residue of petroleum distillate inside the drum ignited by the heat of the torch.

The judge based his conclusion that Smith violated section 104 on the evidence that "[the employee] applied a torch to a container which had contained combustible or flammable oil without draining, ventilating, and cleaning the barrel." 3 FMSHRC at 2932. In assessing the penalty, the judge also determined that Smith was negligent. The judge found that Smith knew or should have known that it was prohibited for the miner to cut the oil drum on company premises. 3 FMSHRC at 2932. The judge emphasized that Smith permitted its employees to take oil drums for personal use, and also at times instructed employees to take oil drums on company property for such company uses as making trash cans. Id. The judge concluded that "[w]hile [Smith] did attempt to instruct the employees as to the proper procedure for purging drums, management could have been more diligent in its attempts to insure that all drums were properly ventilated and cleaned." Id.

On review Smith, proceeding pro se, commingles liability and negligence arguments. Smith does not deny that the miner cut the drum without first purging it. The operator contends, however, that Smith is neither liable nor negligent in connection with the incident because he had previously instructed the employee in proper purging procedures and did not specifically authorize him to cut the drum on company property and could not have foreseen that he would do so. We are not persuaded

2/ The plant superintendent testified that the plugs were not removed (a procedure that would have allowed some ventilation of the drum) because the distributor had requested that the plugs not be removed until the drums being returned for credit.

3/ Testimony at the hearing indicated that the miner intended to use the drum at his home as a receptacle for draining oil. Tr. 38, 50.

cannot be squared with either the broad and mandatory language of the standard or the liability without fault structure of the Mine Act. Southern Ohio Coal Co., 4 FMSHRC 1459, 1462-64 (August 1982). See also Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982). We therefore affirm the judge's conclusion that a violation of the standard occurred.

Regarding negligence, section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. Southern Ohio Coal Co., FMSHRC at 1463-64. See also Nacco Mining Co., 3 FMSHRC at 848, 850 (April 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation). In light of these general principles, we affirm the judge's conclusion that the employee's conduct was foreseeable and that Smith did not meet its duty of care under the circumstances.

An employee's cutting of a used drum with a torch at Smith's mine operation was not an uncommon occurrence. Smith's employees performed that task to make barrels for storing or burning trash at the plant. The employee in question had previously cut drums on company premises for such business purposes, and that function was part of his job description. FMSHRC at 2931; Tr. 76, 83, 85-86. As the judge found, Smith was a "liberal" in allowing its employees to take used drums for their own use. FMSHRC at 2932, and the same employee had been given drums in the past for his personal use. Tr. 55-56, 85. Cutting used drums to make receptacles was a common use of the drums. We thus affirm the judge's finding that on the day of the accident it was reasonably foreseeable that the employee might cut the drum on company property.

The used drum taken by the employee had not been purged nor had its plug been removed. A plugged, unpurged drum that has contained a flammable substance is a highly dangerous instrumentality given an ignition source and the consequent possibility of an explosion if heat is applied. An operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with

maintain control over unpurged drums. For example, Smith could have marked unpurged drums, "purge before cutting"; it could have posted the storage area a warning sign reminding employees of appropriate purging procedures; cutting could have been permitted only under supervision in designated areas. The record does not show that Smith took any such precautions. Indeed, the superintendent did not issue company instructions on purging when he let the employee take the unpurged drum even though, as we have concluded, it was foreseeable that the employee might cut it with a torch on company premises.

Thus, we agree in result with the judge that Smith was negligent in not discharging an appropriate duty of care under the circumstances of this case. In reaching this conclusion, however, we do not endorse the judge's reasoning that an operator in Smith's position should have purged all containers that held flammable substances before storing them. Although this may indeed be a safe practice to follow, the standard requires purging before heat is applied. Thus, in this case Smith's duty of care could have been met by something more than mere reliance on oral instruction, but less than the across-the-board purging procedure suggested by the judge. 5/

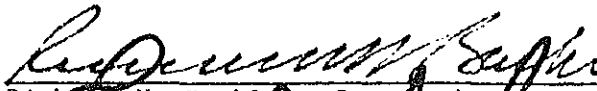
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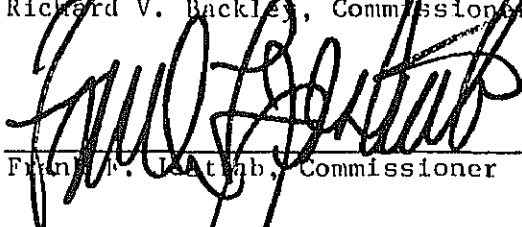
4/ Although the superintendent denied authorizing the employee to cut the drum on company property, he did not forbid any cutting. Smith, indeed, testified that he would have given permission for cutting if the employee requested it. 3 FMSHRC at 2933; Tr. 87. This testimony reveals a managerial disposition to allow cutting for personal purposes and underscores our conclusion that insufficient care was taken when personal use of the drum was approved.

5/ We also reject two additional arguments posed by Smith. Smith complains that the transcript of the hearing was not made available to him. At the hearing, however, the judge specifically stated in response to Smith's request that transcripts could be obtained from the record. Tr. 133. Smith also complains of the Secretary's change of position from not pleading negligence to alleging negligence just before trial. Smith fails to show how this pre-trial change of theory was prejudicial to him. Smith was informed prior to trial that the Secretary would attempt to prove negligence on the basis of new evidence. 8-9. A shifting of legal theories based on evidence revealed through discovery or other sources after the initial pleadings is certainly

(Footnote continued)



  
Richard V. Backley, Commissioner

  
Frank R. Jantab, Commissioner

  
A. E. Lawson, Commissioner

  
L. Clair Nelson, Commissioner

5/ continued

common. The Secretary orally sought a continuance to prepare his negligence claim, and Smith did not oppose the motion. Tr. 8-12. Smith did not specifically explain to the judge how it would be legally precluded by the change of theory, did not state that it would need extra time to prepare any additional defense, and did not attempt to show bad faith or dilatory motive on the Secretary's part. Tr. 8-15. Finally, at no time during the administrative hearing did Smith object to the production of this evidence on the grounds that it was outside the scope of the pleadings. We find Smith's conduct tantamount to consent to the trial of the negligence issue. See in general, Mineral Industries v. Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1293-94 (5th Cir. 1981).

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Wheeler Green, Safety Director  
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Administrative Law Judge George Koutras  
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Falls Church, Virginia 22041

Administrative Law Judge Decisions

JIM WALTER RESOURCES, INC.,	:	Application for Review
Contestant	:	
v.	:	Docket No. SE 82-34-1
	:	Order No. 0757586; 2
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 32-53
Petitioner	:	A/O No. 01-01401-030
v.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

### DECISION

Appearances: Robert W. Pollard, Esq., Birmingham, Alabama, and  
 Reynolds, Esq., Tampa, Florida, for Jim Walter  
 Frederick W. Moncrief, Esq., Office of the Solicitor  
 Department of Labor, Arlington, Virginia, for  
 of Labor.

Before: Administrative Law Judge Broderick

### STATEMENT OF THE CASE

On February 15, 1982, a fatal roof fall occurred at the  
 Walter Resources (the operator). Following an investigation  
 on February 16, 1982, MSHA on February 19, 1982, issued an im-  
 plementation order under section 107(a) of the Federal Mine Safety  
 and Health Act, 30 U.S.C. § 817(a) (the Act). The order also alleged  
 that the order was proscribed by the approved roof control  
 plan, 30 C.F.R. § 75.200.

or, was called as a witness by the operator and Charles J. Hager, I  
derick Carr also testified on the operator's behalf. A civil penal  
s subsequently filed. Because the civil penalty proceeding and the  
proceeding involve the same order, and similar issues of fact and l  
e hereby CONSOLIDATED.

th parties have filed posthearing briefs. On the basis of the evid  
ced at the hearing and considering the contentions of the parties,  
e following decision.

### ISSUES OF FACT

At all times pertinent to these proceedings, Jim Walter was the o  
rator of the No. 7 Mine in Tuscaloosa County, Alabama.

On February 15, 1982, a fatal roof fall occurred in the subject m  
face area of No. 4 entry, No. 1 section.

An order of withdrawal was issued on February 19, 1982, which all  
e following condition or practice occurring on February 15, 1982,  
uted an imminent danger and a violation of the approved roof contro

A fatal roof fall accident occurred on the No. 1 section at  
e face of the No. 4 entry and based on evidence and testimony,  
e victim was installing a support to install line curtain  
d while installing the support the victim was standing more  
an 5 feet inby the permanent roof supports and more than 5 feet  
om the rib or face. The approved roof control plan requires  
nt workmen shall be within 5 feet of the face or rib or  
rmanent supports while extending line curtain.

On February 19, 1982, a modification of the order of withdrawal v  
which permitted mining operations to continue "while the following  
e of roof supports are installed to advance the line curtain and to  
MSHA personnel to evaluate this system:" A minimum of two temporar  
s are required when any work is performed inby the last row of  
nt supports. One must be a jack or timber set no more than 5 feet  
and the other the miner head placed against the top. These support  
e not more than 4 feet apart and not more than 5 feet inby the las  
anent supports or last temporary support. Any work done inby the l  
roof supports shall be done between such supports and the nearest

supports to reset the jack and reattach the line curtain to 1 on the left side (the "wide side") of the curtain after examining visually and sounding it with a hammer. The miner operator went to the right side of it and the helper began tightening standing on the left side. A roof rock fell brushing the miner knocking him back against the right rib. It fell on top of the killed him. The victim was approximately 7-1/2 feet from the 5 feet inby the last standing roof jack. He was 10 feet inby permanent roof supports.

7. The approved roof control plan in effect for the sub time of the fatality contained the following safety precaution

"4. When testing roof or installing supports in the area, the workmen shall be within 5 feet (less if indicated sketch) of a temporary or permanent support."

"5. When it is necessary to perform any work such as line curtains or other ventilating devices inby the roof to make methane tests inby the roof bolts, a minimum of temporary supports shall be installed. This minimum is only if they are within 5 feet of the face or rib and the done between such supports and the nearest face or rib."

8. The approved ventilation plan in effect for the sub time of the fatality required that a line curtain be maintained 10 feet of the face. The mine liberated considerable methane an exceptionally high velocity and quantity of air to ventilate. Because of this it was necessary to fasten the curtain to the and the bottom of the temporary support.

9. A fatal roof fall occurred at the No. 3 Mine of Jim November 21, 1979, under circumstances similar to those involved. A citation was issued in the prior case charging a violation § 75.200 because of failure to comply with the approved roof citation was contested before the Commission. After a hearing Laurensen found that paragraph 4 of the roof control plan (which to the same paragraph in the roof control plan applicable in require that miners travel between the temporary support and when setting supports to extend the line curtain. The Judge of contest and vacated the citation. Jim Walters v. Secretary (1980).

11. The Secretary did not petition for review of Judge Laurenson's decision.

12. Subsequent to Judge Laurenson's decision, there were discussions between MSHA officials and the operator attempting to clarify the requirements of paragraphs 4 and 5 of the safety precautions in the roof control plan. Changes were agreed upon.

13. Subsequent to the fatal roof fall involved herein, there have been discussions between MSHA and the operator relating to paragraphs 4 and 5 of the safety precautions in the approved roof control plan. Specifically, a rewrite of the above paragraphs permitting the use of the miner head as roof support has been discussed, but the plan has not yet been modified.

#### STATUTORY PROVISION

Section 3(j) of the Act defines an imminent danger as "the existence of a condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice is abated."

#### REGULATORY PROVISION

30 C.F.R. § 75.200 provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequately of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

existed in the subject  
danger.

2. Whether a violation of the approved roof control plan of 30 C.F.R. § 75.200 was established.

(a) Whether the Secretary is estopped or barred from asserting that the condition is a violation of the standard reason of the decision in Jim Walters Resources Inc., 2 3276 (1980).

3. If a violation of the mandatory standard was established, appropriate penalty therefor?

#### CONCLUSIONS OF LAW

Jim Walter Resources, Inc. was subject to the provisions of the Mine Safety and Health Act in the operation of the No. 7 Mine. Pertinent hereto, and the undersigned Administrative Law Judge over the parties and subject matter of this proceeding.

#### IMMINENT DANGER

The existence of an imminent danger and the propriety of an order of withdrawal do not depend upon the existence of a violation of a mandatory standard. Freeman Coal Mining Corporation, 2 IBMA 100, 101 (1974). Imminent danger under the Act is not limited to situations involving a "clear and present danger" but includes conditions that "would induce a reasonable man to believe that if normal operations . . . proceeded, it is at least just as likely that the feared accident or disaster would occur before elimination of the danger." Old Ben Coal Corp. v. Interior Bd. of Mine Op. App. (7th Cir. 1975), quoting Freeman Coal Mining Co. v. Interior (504 F.2d 741, 743 (7th Cir. 1974)).

The order under review here alleges that a miner was standing 5 feet inby the permanent roof supports and more than 5 feet from the face, and the evidence introduced at the hearing establishes the facts (Finding of Fact No. 6). MSHA roof control specialists testified that this practice equivalent to travelling or working under unsupported roof is therefore an imminent danger. His opinion was based in part on the one which occurred here and the one which occurred in Jim Walters referred to in Finding of Fact No. 9.



also present a hazard in no way negates the danger posed by unsupported roof. The fact that the condition or practice was permitted by the roof control plan (if it was) does not negate the existence of an imminent danger. The fact that working or travelling more than 5 feet in by permanent supports more than 5 feet from a rib or face is an imminent danger and the withdrawal order was properly issued.

The operator argues that the practice cannot constitute an imminent danger because it has been followed for many years in the subject mine and in other mines in the district. Non sequitur. The fact that an imminently dangerous condition has existed and been tolerated is no argument for its continuance. The operator also argues that the 3 day delay between the investigation and the issuance of the order indicates that the condition was not imminently dangerous. MSHA's explanation for the time period is that there were discussions with State officials, Mine Management and Union representatives concerning the practice, and that when Mine Management stated that the practice would continue, it was decided to issue the withdrawal order. Clearly, the withdrawal order should have been issued immediately after the investigation, but the delay does not establish that the condition or practice was not imminently dangerous.

#### JUDICIAL/COLLATERAL ESTOPPEL

Judge Laurenson's decision, which involved, as the Solicitor states, "virtually identical circumstances" to those in the case before me, held that paragraph 4 of the precautions in the roof control plan governs when roof supports are being installed to extend the line curtains. Since paragraph 4 does not require that miners stay within 5 feet of a rib or face, he vacated the citation and dismissed the civil penalty proposal. Judge Laurenson's decision followed a formal adversary hearing; both parties filed posthearing briefs. The government did not file a petition for discretionary review with the Commission. Counsel states "that some consideration was given to whether it was worth it to file a [petition for review]" but in any event, it was not filed. Therefore, Judge Laurenson's decision was the final decision of the Commission.

Following that decision MSHA could have petitioned for review (and would have appealed to the Court of Appeals if the petition was denied) or it could have decided to modify the roof control plan. It did neither, but rather chose to ignore the decision and yet continue to enforce its interpretation of the roof control plan which had been rejected. The parties to the two proceedings are the same, the roof control plan has not been changed, the circumstances are "virtually identical." It would appear that if res judicata is applicable to administrative proceedings, it is applicable here.

justification for a second evidentiary hearing. The issue has already resolved as between the two parties.

See also Mitchell v. National Broadband Co., 542 F.2d 1177 (9th Cir. 1977); Atlantic Richfield Company v. Federal Energy Regulatory Commission, 542 (T.E.C.A. 1977); Bowen v. United States, 542 (T.E.C.A. 1977); Continental Can v. Marshall, 603 F.2d 1000 (5th Cir. 1979). In the Can case, the court held (594-5) that the facts of the present case are the same as that decided in the Can case; whether the issue was actually litigated; whether the Secretary's decision on the resolution of the issue; and whether the Secretary's decision is supported by substantial evidence. The Secretary asserts in his brief that Judge Laurensen's decision is not a precedent. This rule has nothing to do with res judicata, but with stare decisis, a wholly different concept. Following the tests in Continental Can that Judge Laurensen's decision is res judicata and the Secretary is precluded from relitigating the issue before me.

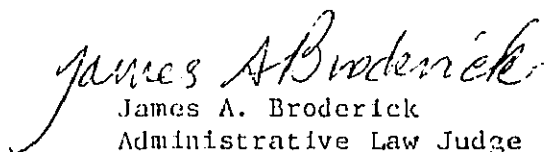
It is grossly unfair to assert, as the Secretary does,

"What is at stake, as these two cases are decided, is human life. However well intentioned the Secretary is in relying on the prior decision, the cost to human life. Such a result is not to be tolerated. The purpose of which is the preservation of life."

Judge Laurensen's decision was issued November 16, 1981. The issue involved herein occurred February 15, 1982. Since the Secretary's appeal, he had ample opportunity to effect change. He failed to do so.

Based upon the above findings of fact and conclusions of law, IT  
ORDERED:

1. The withdrawal order issued under section 107 of the Act, as withdrawal order is AFFIRMED.
2. The withdrawal order, insofar as it charges a violation of 375.200, is VACATED.
3. The penalty proceeding is DISMISSED.

  
James A. Broderick  
Administrative Law Judge

Distribution: By certified mail

Robert W. Pollard, Esq., Post Office Box C-79, Birmingham, AL 35283

Gerald Reynolds, Esq., 1500 N. Dale Mabry Highway, Tampa, FL 33607

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929 9th Avenue South, Birmingham, AL 35256

FURTHER FINDINGS OF FACT  
AND  
FINAL ORDER

On November 30, 1982, a decision was entered on the issue of section 105(c) of the Federal Mine Safety and Health Act of \$ 801, et seq. The decision deferred a final order pending on the parties as to the appropriate relief to be granted based on

FINAL ORDER

Having considered the parties' submissions with respect to order, and a post-decision motion by the United Mine Workers to intervene for the purpose of submitting a proposed order for re ORDERED:

1. The UMWA's motion to intervene is DENIED as being without good cause on the merits.
2. The Secretary's proposed supplemental stipulations are hereby INCORPORATED as FURTHER FINDINGS OF FACT in this proceeding.
3. Based on the record as a whole, and on the statutory criteria assessing a civil penalty for a violation of the Act, Respondent is hereby ORDERED to pay a civil penalty of \$800 for its violation of section 105(c) of the above-mentioned decision; Respondent shall pay such penalty within 30 days from the date of this Order.
4. Respondent shall make payment to George Mateleska in the sum of \$392.40, with interest at the rate of 12 percent per annum accruing from 1981, until paid, to compensate him for the 5 days lost pay income of Respondent's unlawful suspension of him.

consecutive period of at least 60 days.

William Fauver  
WILLIAM FAUVER, JUDGE

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Shane A. Lewis, Esq., Thorp., Reed & Armstrong, 2900 Grant Building, 1  
PA 15219

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th Street  
Washington, DC 20005

DECISION

Appearances: Grant L. Foutz, Esq., Gallup, New Mexico, appeared for Complainant;  
Lindsay Lovejoy, Esq., Stephenson, Carpenter, Cron and Lea Brownfield, Esq., all of Santa Fe, New Mexico, appeared for Respondent.

STATEMENT OF THE CASE

The complaint filed herein alleges that Complainant was directly protected under the Federal Mine Safety and Health Act of 1977 § 801. Complainant filed a complaint of discrimination with MSHA in 1980. MSHA denied the complaint by a letter dated January 6, 1982. A complaint was filed with the Review Commission on January 25, 1982. On notice, the case was heard in Gallup, New Mexico, on October 19, 1982. Allen, Gilbert MacLellan, Robert Robb and Ron MacLellan were called by Complainant. No witnesses were called by Respondent. Both parties filed posthearing briefs with proposed findings of fact and conclusions. Based on the entire record, and considering the contentions of the parties, we make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Northeast Church Rock Mine near Gallup, New Mexico.

a journeyman mechanic at the time of the hearing.

3. In 1977 and 1978, Complainant received very few complaints regarding safety from those who worked under him--approximately 10 each year. In 1979, safety complaints went up to perhaps 10 each day. At least two employees left the company because they were concerned about safety. The alleged unsafe conditions included loose rock, cave-ins, and improper ventilation. Complainant's employees were required to travel over muck piles and ground fall piles without proper equipment. A number of citations were issued by MSHA inspectors in 1979 due to these conditions. Complainant reported these conditions to his supervisors in the Safety Department "plenty of times."

4. On one occasion in April of 1979, a loader had been taken out of service by Complainant's crew because it did not have brakes. The loader was "red-tagged." However, the production crew ignored the red tag and put the loader in service. An MSHA inspector discovered that it had no brakes and issued a citation. Complainant was upset and voiced his feelings to his supervisors. In February, 1980, a haulage truck was taken out from the shop although it had a faulty shift lever. An accident occurred when the truck slipped out of gear.

5. On many occasions, Complainant reported inadequate ventilation in the shop which caused dizziness and disorientation in his employees. His supervisors told him they were trying to correct the condition and that if his employees didn't like it they could quit.

6. Production meetings attended by Complainant were held twice daily. Complainant brought up safety complaints at these meetings and was accused of complaining and griping.

7. In early 1979, Complainant reported that loose rock and ground fell from the roof of a part of the maintenance shop. The roof bolts had become loose. An attempt was made to correct the situation but eventually the shop roof caved in.

11. During the time Robb was life supervisor, any safety complaints, oral or written, to him, or complaints made to prior supervisors.

12. On March 25, 1980, Complainant was called to Mike Robb's office. Robb, Troxell, Wayne Bennett, and Industrial Relations Department and Complainant advised Complainant that lack of water control had caused problems, parts were not being properly handled and was going to be complaining and very little action." The complaint was availability and production abuse of equipment. Complainant's performance was not satisfactory and that he was to see Robb and Troxell every Monday morning and discuss the previous week. A deadline of May 1 was set for the meeting. Complainant did not bring up any safety complaints at the meeting.

#### DISCUSSION

There is sharp disagreement between Complainant and Robb place at the meeting. Neither Bennett was in the room. According to Robb both were employed by other companies in New Mexico. Complainant stated that Robb told him he was doing his job, but was going around complaining and that this to refer to safety complaining. Robb testified to specific instances where Complainant's work was not satisfactory. Complainant testified that at the conclusions of the meeting he was to resign and have "layoff status, severance pay for a period of time, or he would be terminated. An answer was given the following morning. Robb testified that at the meeting Complainant was told that he would in effect be paid for the week following Monday and would have to show up for work the following Monday. Complainant generally accepting Mr. Robb's version of the meeting.



15. On August 8, 1980, Complainant filed his initial complaint with MSHA. An investigation was conducted and MSHA denied the complaint on January 1, 1981. Complainant filed his complaint with the Review Commission on January 1, 1981.

### DISCUSSION

Complainant offered in evidence a copy of the MSHA Investigation Report which he received from MSHA Dallas Office. Respondent objected and I sustained the objection primarily because substantial portion of the investigation report and of the transcripts of interviews had been excised. Complainant did not attempt to subpoena the record or the investigator. The exhibit as offered was in some extent unintelligible and possibly prejudicial. I conclude that it would be unfair to the parties and unhelpful to me to admit the exhibit.

16. Robb left Respondent's employ on March 30, 1980. He knew on March 30, 1980, that he was going to leave on March 30. He expected that the complaint which Complainant referred to in Finding of Fact No. 12 would be conducted by MSHA. I conclude that the complaint would be conducted by MSHA.

### STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

respect to Complainant. Complainant returned to underground duties in February, 1980. His job title was 1700 level foreman and he was under the immediate supervision of Jerry Troxell who became general underground foreman.

10. In February or early March, 1980, Robb told Complainant that he thought the truck shop "was a complete mess" and that he would have to improve the condition of the shop.

11. During the time Robb was his supervisor, Complainant did not make any safety complaints, oral or written, to him, nor was Robb aware of any complaints made to prior supervisors.

12. On March 25, 1980, Complainant was asked by Troxell to come to Mike Robb's office. Robb, Troxell, Wayne Bennett, head of Respondent's Industrial Relations Department and Complainant were present. Robb told Complainant that lack of water control had caused equipment to break down. Parts were not being properly handled and Complainant "did a great deal of complaining and very little action." The complaints concerned lack of water availability and production abuse of equipment. Robb told Complainant that his performance was not satisfactory and that henceforth he would come to Robb and Troxell every Monday morning and discuss his job performance of the previous week. A deadline of May 1 was set for Complainant to show improvement. Complainant did not bring up any safety complaints or concerns during the meeting.

## DISCUSSION

There is sharp disagreement between Complainant and Robb as to what took place at the meeting. Neither Bennett nor Troxell was called as a witness. According to Robb both were employed by other companies out of the state of New Mexico. Complainant stated that Robb told him he (Complainant) was not doing his job, but was going around complaining all the time. Complainant said this to refer to safety complaining. Robb testified that he pointed out specific instances where Complainant's work was unsatisfactory. Complainant testified that at the conclusions of the meeting he was told that he had to resign and have "layoff status, severance pay (and) insurance coverage for a period of time, or he would be terminated. An answer was demanded the following morning. Robb testified that at the conclusion of the meeting Complainant was told that he would in effect be placed on probation and be counseled every Monday and would have to show improvement by May 1. I am generally accepting Mr. Robb's version of the meeting. This is

## DISCUSSION

Complainant offered in evidence a copy of the MSHA Investigation which he received from MSHA Dallas Office. Respondent objected and I the documents primarily because substantial portion of the investigation and of the transcripts of interviews had been excised. Complainant did attempt to subpoena the record or the investigator. The exhibit as of to some extent unintelligible and possibly prejudicial. I conclude that would be unfair to the parties and unhelpful to me to admit the exhibit.

16. Robb left Respondent's employ on March 30, 1980. He knew on 1980, that he was going to leave on March 30. He expected that the copy of Complainant referred to in Finding of Fact No. 12 would be conducted Troxell.

## STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against otherwise interfere with the exercise of the statutory rights of miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter

sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

## ISSUES

1. Whether the complaint is barred by the statute of limitations or laches.
2. Whether Complainant voluntarily left his employment with Respondent on March 26, 1980, or was discharged, actually or constructively.
3. If Complainant was discharged, was it related to activity protected under the Act.
4. If Complainant was discharged for protected activity, what relief should be awarded.

## CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. The complaint is not barred by the limitations for filing claim set out in section 105(c) of the Act or by laches.

employment was terminated March 26, 1980. However, he remained on by reason of severance pay to July 15, 1980. He claims that he was because of his mother's illness at the time. Respondent asserts that resulted from the delay because former supervisors Jack Miller, Wayne Jerry Troxell and Mike Robb have left Respondent's employ, and all are now living and working outside of New Mexico.

It has been held that the statutory filing deadlines are not jurisdictional. Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 1539 (1981). See also Christian v. South Hopkins Coal Co., 1 FMSHR Local 5429 v. Consolidation Coal Co., 1 FMSHRC 1300 (1979); S. Rep. 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY of the MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Civil Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It should be emphasized, however, that these time-frames [in 105(c)] are not intrajurisdictional.")

The questions to be considered here are whether Complainant showed justifiable circumstances for his delay in filing and whether the delay prejudiced Respondent. See Herman v. Imco Services, 4 FMSHRC (December 15, 1982).

The fact that Complainant remained on the payroll and suffered no loss is, I conclude, sufficient reason justifying a delay in filing. It is conceivable that Complainant feared that filing a claim could jeopardize his severance pay rights. Although Respondent claims prejudice, it did not claim that an attempt was made to preserve testimony when it became aware the claim was filed, or that it attempted to obtain the testimony of the employees by deposition. Complainant cannot be blamed for the delay until the time he filed with MSHA and MSHA's decision 16 months later.

3. The complaints which Complainant voiced to his superiors concerning unsafe and unhealthful conditions under which he and his crew worked were those described in findings of fact 3 through 7, constituted activities protected under the Mine Safety Act. Any adverse action because of this protected activity would violate section 105 of the Act.

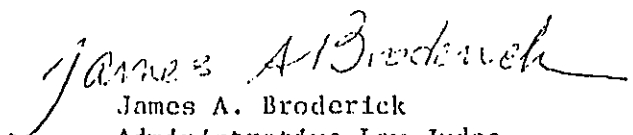
4. Complainant left his employment with Respondent on March 26, 1980, voluntarily. He was not discharged and the termination of his employment was not related to any activity protected under the Mine Safety Act.

n Finding of Fact No. 12, I accepted the testimony of Robb to the effect that the discipline imposed on Complainant at the March 25, 1980, meeting was to place him on a form of probation. He was not discharged. Apparently, in refusing to accept the probationary status, he voluntarily resigned. The discipline was imposed solely by Robb. It resulted from Robb's evaluation of Complainant's work performance. Whether the evaluation was accurate or whether it was fair is not a matter for me to decide. I accept the testimony of Robb that Complainant made no safety related complaints to him and that he (Robb) was not aware of any such complaints having been made to others. Therefore, the discipline imposed by Robb, such as it was, was not related to activity prohibited under the Act.

. Since Complainant failed to establish that he was discharged or otherwise discriminated against in violation of section 105(c) of the Act, he is not entitled to the relief sought in his complaint.

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

  
James A. Broderick  
Administrative Law Judge

Distribution: By certified mail

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Post Office Box 669, Santa Fe, NM 87504-0669

John Brownfield, Esq., United Nuclear Corporation, Post Office Box 2248,  
Santa Fe, NM 87501

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

PHELPS DODGE CORPORATION,  
Respondent

: Civil Penalty Proceeding  
:  
: Docket No. CENT 82-33-M  
: A.C. No. 29-00159-05018  
:  
: Tyrone Mine & Mill  
:  
:  
:

### DECISION

Appearances: Marigny A. Lanier, Esq., Office of the  
Solicitor, U. S. Department of Labor,  
Dallas, Texas, for Petitioner, MSHA;  
James G. Speer, Esq. and Stephen W.  
Pogson, Esq., Evans, Kitchel & Jenckes,  
P.C., Phoenix, Arizona, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil  
penalty filed by the Secretary of Labor against Phelps Dodge  
Corporation for an alleged violation of 30 C.F.R. § 55.9-2.

Section 55.9-2 provides as follows:

Equipment defects affecting safety shall be  
corrected before the equipment is used.

The subject citation which is dated May 15, 1981 reads  
as follows:

After talking with Kim Kersey, Maintenance  
Foreman, Kaye Staley, Driver, Milo Lambert,  
Miners Representative and Dave Kuester,  
Miners Representative, I have reason to  
believe there was a safety defect affecting  
safety on the #214 Muck Truck involving the  
front suspension in that prior to my arrival  
on the property there had been much controversy



far as to ask for a blue card in order to go to the doctor if not taken off the truck or the truck repaired. On 5/8/81 a telephone call was received by the MSHA Office in Carlsbad, N.M. to voice their complaint. They were advised to contact Milo Lambert or Dave Kuester the Miners Representatives. I arrived on the property at approximately 1800 hours on the 13th of May 1981 on other business. We returned the following morning to complete the other business and to serve other complaints. When we arrived we noted that the #214 Muck Truck was in the truck shop being repaired. The morning of the 15th of May 1981 we served the complaint on the #214 truck. We learned that the #214 truck had been put into the shop for a routine maintenance service on the same morning that we were driving to Silver City, N.M. in that the company was aware that we were on the way over, because of a phone call to the company made by Sidney R. Kirk, Supervisory Inspector MSHA concerning the investigation of an accident.

The inspector who issued the citation testified that miner complained to MSHA that the suspension on the No. 2 haulage truck was bottoming out and represented a hazard safety (Tr. 10-11). As a result of this complaint the inspector was told to visit the mine and check out the truck (Tr. 10-11). At the hearing the inspector was confused and inconsistent about when he visited the mine and talked to the drivers (Tr. 11, 14, 17, 25, 27-28, 33-34, 41-47, 55). After reviewing his testimony I find that on or about May 15 during the day he visited the repair shop at the mine and spoke to the repair shop foreman about the 214 truck (Tr. 27-28, 34, 43). When the inspector arrived the front suspension already had been removed and a new suspension had been installed (Tr. 14, 73-74). The shop foreman complained to the inspector about spending \$6,000 to replace a front suspension that was still good but he said that the replacement was being done because it was called for under the company's preventive maintenance schedule (Tr. 15-16, 55-56). The old suspension was in the back of the shop where the inspector could have seen it but he did not (Tr. 191-192, 194). The inspector admitted that he had no personal

or not to issue a citation after he had spoken to the drivers of the 214 truck (Tr. 21-22, 25).

That evening the inspector spoke to several drivers the 214 truck including Kay Stailey, Pedro Mondragon, K. W. Donaldson, Emory Baker, Juan Verdugo, and Ramon Na (Tr. 36-37, 45-46). According to the inspector they told him that because of worn out suspensions the truck bottomed out, was unstable and control of its steering could not be maintained (Tr. 17-18, 36). They also advised the truck rode rough and Ms. Stailey who told the inspector she drove the truck on May 8, said she had hurt her back because of the bad suspension (Tr. 46-48). Based upon what the driver told him the inspector decided to issue a citation, wrote it up 2 days later and then mailed it to the operator (Tr. 22, 54). However, the inspector erroneously put down the issuance date as the day he had spoken to the foreman and the drivers (MSHA Exh. No. 1).

Five of the drivers who had operated the 214 truck testified at the hearing. The first and most important was Ms. Stailey. It was she who complained to MSHA that on May 8 when driving the truck she injured her back due to the bad suspension (Tr. 47-48, 85). She repeated these complaints at the hearing, testifying that on May 8 the truck drove like a jackhammer due to bad suspension (Tr. 85-86, 92). She also contended that the cab and back of the truck were loose (Tr. 86, 93). She said she had complained three times that night and finally because her back hurt she asked for a blue card which would have enabled her to go to the hospital (Tr. 87-88). On cross examination Ms. Stailey agreed that according to established procedures the drivers fill out a checklist for each truck they drive (Tr. 95). If more than one truck per shift is driven by a driver, the driver must fill out a checklist for each truck (Tr. 128). The checklist sets forth several items including suspension, with respect to which the driver is supposed to report any problems or deficiencies (Tr. 96, Optr's. Exh. Nos. 2-8). There is a place on the form for driver comments. The checklist which Ms. Stailey filled out for May 8 indicates she drove the 219 truck, not the 214 (Optr's. Exh. No. 2). Ms. Stailey contended that she made her 9's like 4's but the operator produced her checklists for the period April 1 through May 16 (Tr. 103-104, Optr's. Exh. Nos. 2 and 3). It is

evidence or even argue in support of Ms. Stailey's contention. I find that on May 8 Ms. Stailey drove the 219 truck. I also find in accordance with the checklist that last day she drove the 214 truck was April 6 (Optr's. Nos. 2 and 3). Ms. Stailey admitted that the April 6 checklist did not indicate any problem with the suspension she said she orally told her foreman the suspension was (Tr. 109).

In addition, on cross examination Ms. Stailey admitted on May 4 she had an accident driving the 217 truck when ran into a berm (Tr. 109). She also admitted that on May 5 she received a written warning from the operator for failure to report the accident and for damage to the 217 truck from the accident (Tr. 112). At first she denied there was any damage, but subsequently she acknowledged there had been some to the truck's ladder (Tr. 110, 118, 121). Finally, when asked whether she had visited a doctor on May 6 on her own volition, Ms. Stailey first stated it was for allergies but when confronted with the medical report of the visit agreed it was for back pain (Tr. 112-114).

Based upon the foregoing I do not find Ms. Stailey a credible witness in any respect. I conclude she last drove the 214 truck more than a month before she complained to the operator. Moreover, she complained to MSHA only a few days after she had an accident with another truck, received a written warning from the operator and visited a doctor for back pain. These circumstances demonstrate that her assertions regarding the alleged lack of safety on the 214 truck due to suspension cannot be accepted.

As already noted, four other drivers of the 214 truck testified. Mr. Mondragon who according to the checklist drove that truck only on April 5 and April 25, stated it was rough and fishtailed although he did not indicate this on his checklist (Tr. 125-126, 131, Optr's. Exh. No. 4). He also orally told the dispatcher in the tower about the rough riding and fishtailing and that the dispatcher was supposed to tell the foreman (Tr. 132). However, he admitted that management "chewed out" drivers who did not complete accurate lists (Tr. 134).

about the suspension (Tr. 142), but it must have slipped his mind but alleged that he orally told the dispatcher about the suspension (Tr. 147-148). I conclude the weight to be accorded the allegations of those two witnesses regarding the suspension on the 214 truck is greatly diminished because they did not put anything on their checklist although they knew this was required. Moreover, these two drivers drove the 214 truck on few occasions.

A third driver, Mr. Verdugo, did indicate a suspension problem on his checklist for May 2 when he drove the 214 truck (Optr's. Exh. No. 7). However, he acknowledged he did not drive the 214 truck very often since his assigned truck was the 216 (Tr. 174). Even more importantly, Mr. Verdugo's complaints regarding the rough riding of the 214 truck must be viewed in light of the fact that he had a severe back problem, was operated on for a ruptured disc on July 28, 1981 and was out of work for this condition from June 17, 1981 to October 7, 1981 and from November 7, 1981 to January 4, 1982 (Tr. 183-184). Finally, Mr. Verdugo continued to complain about rough riding on the 214 truck after the suspension had been replaced (Tr. 180-182). In light of the foregoing circumstances, I do not find Mr. Verdugo's testimony persuasive regarding alleged safety hazards and the nature of the ride on the 214 truck.

The fourth driver who testified was Mr. Donaldson. He was assigned to the 220 truck but because he traded shifts with a driver named Dave Brown, he drove the 214 truck around the time Ms. Stailey made her complaint (Tr. 150-151). Mr. Donaldson said that the 214 truck rode rough compared to the other trucks but the only checklist he completed for the 214 truck which mentioned the suspension was dated May 12, 4 days after Ms. Stailey complained (Tr. 151-152, Optr's. Exh. No. 6). Mr. Donaldson admitted he did not always fill out the lists accurately (Tr. 157). He stated that he did not know for sure whether he had noted the suspension as a problem on May 12 because Ms. Stailey had spoken to him about her complaint, but he readily admitted he wished to help her (Tr. 167, 171-172). Even more importantly, Mr. Donaldson admitted that he did not consider the 214 truck unsafe for him when he was driving it (Tr. 171). I find Mr. Donaldson's opinion regarding the safety of the 214 truck which was given with candor to be persuasive and I accept it.

only eight times (Ex. 3, Encl. Nos. 2 & 3). Also the drivers who testified did not use the 214 very often. The records for the 214 truck reveal other drivers used that truck with greater frequency than those who testified.

The operator's repair shop foreman, Mr. Kersey, testified that haulage trucks are given priority in maintenance repairs because they are essential to production (Tr. 67). Suspensions are changed on haulage trucks every 10 to 10,000 hours (Tr. 70, 201). On April 17 a work order was issued to change the suspensions on the 214 truck. It was the truck whose suspensions had the most problems (Tr. 68-70). On April 21 and May 2 the operator received rebuilt suspensions which were installed on the 214 truck on May 13 (Tr. 78, 83). The foreman looked at the suspensions before and after they were changed and he saw no cracks (Tr. 211). As already noted, the inspector did not find cracks in them. In addition, x-rays of the suspensions taken off the 214 truck showed no cracks (Tr. 204). The foreman testified that when the suspensions were removed, "donuts", which are rubber cushions in the suspensions and which would disintegrate if there had been a bottoming out of the truck, were found to be intact (Tr. 198, 204-205, 216). The foreman further testified that the suspensions were being replaced pursuant to the company's maintenance program and that up to the time of the inspector's visit he did not know of any miner complaint to MSHA about the 214 truck (Tr. 69-70, 203, 208-209). I find the foreman credible and accept his testimony. I conclude therefore, that the suspensions were being replaced pursuant to the regular preventive maintenance program and I reject any suggestion that they were changed in order to avoid issuance of a citation because a complaint had been made to MSHA. I further conclude that the suspensions were free from defect and that there was no bottoming out on the 214 truck.

Mr. Chandler, the parts and service consultant for the manufacturer of the 214 truck, testified that he had driven the truck Phelps Dodge had and that trucks like the 214 do not drive bumpy (Tr. 230). Both Mr. Kersey and Mr. Chandler listed a number of factors which would cause a rough riding truck including speed and road conditions (Tr. 209, 230-231). Finally, the 214 truck as described by

Based upon all the evidence I conclude that there were no defects in the suspension of the 214 which affected safety. For reasons already noted, the principal complaint upon whom MSHA relied is not credible. But to the extent that some of the other drivers believe the 214 was unsafe because of the suspension, I find more persuasive the contrary evidence of the operator which demonstrates that there was nothing wrong with the suspensions and that they were being replaced pursuant to routine maintenance procedure. I already noted the opinion of one of the drivers, Mr. Donaldson, that the 214 truck was not unsafe but only rough riding and I rely also upon the infrequency with which the checklist for the 214 identified suspension as a problem.

I recognize that under the Act miners are strongly encouraged to participate in the preservation and maintenance of health and safety in the mines. They are after all, men whose lives are on the line. But the positions miners take and the complaints they make must be supportable and prevail over contrary evidence produced by operators accused of violations. In this case MSHA failed to prove a violation. The great weight of probative evidence favors the operator.

#### ORDER

Accordingly, it is ORDERED that Citation No. 173586 be Vacated and that the petition for the assessment of a penalty be DISMISSED.

A large, stylized handwritten signature in black ink, which appears to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

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SECRETARY OF LABOR,	:	Civil Penalty Pro
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 8
Petitioner	:	A.O. No. 36-00970
	:	
v.	:	Maple Creek No. 1
	:	
U. S. STEEL MINING CO., INC.,	:	Docket No. PENN 8
Respondent	:	A.O. No. 36-03425
	:	
	:	Maple Creek No. 2
	:	
U. S. STEEL MINING CO., INC.,	:	Contest of Citati
Contestant	:	
	:	Docket No. PENN 8
v.	:	Citation No. 9901
	:	
SECRETARY OF LABOR,	:	Maple Creek No. 1
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 8
Respondent	:	Citation No. 9901
	:	
	:	Maple Creek No. 2

### DECISION AND ORDER

These consolidated review-penalty cases are based on the parties' waiver of hearing and cross motions for summary decision on stipulated facts. The dispute centers on the proper interpretation of the facts and applicable law. The core issues are:

1. Whether a sample of respirable dust taken at the end of a single shift by a duly certified representative of the Secretary (a coal mine inspector) in accordance with the procedure prescribed by the



3. Whether the violations charged "could have contributed to a significant and substantial" mine health hazard.

### Findings and Conclusions

The fundamental requirement of the respirable dust standard is that the average concentration be continuously maintained below 2 milligrams per cubic meter of air ( $2\text{mg}/\text{m}^3$ ). Section 202(a), 30 C.F.R. 70.100. The two milligram standard must be lowered, however, whenever the total respirable dust mass in the mine atmosphere contains more than 5% quartz. Section 205, 30 C.F.R. 70.101. Consequently, when sections 202(a) and 205 are read together the statutory respirable dust standard is 2 milligrams (not to exceed 5% quartz) per cubic meter of air.

When the presence of an excessive concentration of quartz is detected, the operator is thereafter required to maintain the respirable dust mass below an average concentration of 2 milligrams of air cubed. The applicable standard is determined by dividing the percentage of quartz into the number 10. 30 C.F.R. 70.101. The formula for determining the applicable respirable dust standard when quartz is present was prescribed by the Secretary of Health Education and Welfare, now the Secretary of Health and Human Services. It was derived from

In these cases, the percent of quartz present on mechanized mining units in question was 11%. Therefore the average concentration of respirable dust in the mine atmosphere associated with the two units had to be there maintained at 0.9 milligrams of respirable dust per cubic meter of air (10/11 equals  $0.9 \text{ mg/m}^3$ ).

# I

Samples for determining the percent of concentration of quartz in the respirable dust mass present in the mine are taken by the Secretary of Labor through duly certified mine inspectors. Such single shift samples are not used to determine compliance with the mine dust standard in effect at the time the sample is taken. The percent of quartz is merely used to set the standard for future sampling. If the percent of quartz in the sample analyzed is more than 5 the Secretary will give the operator notice of a lower standard which will thereafter be used to establish compliance or noncompliance on the basis of averaging multi-shift samples taken by the operator during his next bi-monthly sampling. 30 C.F.R. 70.201, 207.

The operator says this procedure is contrary to the standard which, it contends, requires all respirable dust samples to be taken by the operator. MSHA, the operator claims can o

asserts the respirable dust samples taken by certified  
who are not employed by the operator are not samples  
be used to lower the 2 milligram standard.  
and the contention without merit.

Section 202(g) specifically authorizes the Secretary of  
his delegate to "cause to be made such frequent spot  
ins as he deems appropriate of the active workings of  
s for the purpose of obtaining compliance with the  
dust standards<sup>7</sup> of Title II<sup>7</sup>. Legislative History,  
1124 (1970). This authority is complemented by that  
section 104(f) which sanctions use of "samples taken  
inspection by an authorized representative of the  
" to determine whether the "applicable limit on the  
tion of respirable dust required to be maintained  
s Act is exceeded", and, if so, for issuance of a  
fixing a reasonable time for abatement."

broad underlying authority, of course, is section  
and (4) which authorize inspections, and therefore  
to obtain "information relating to health conditions  
causes of diseases" and to determine "whether there  
ance with the mandatory health standards . . . or  
uirements of this Act". The cumulative import of  
ority provides compelling support for the view that

Under section 205 of the Coal Act the Secretaries Interior and of Health, Education and Welfare were delg authority to develop and promulgate a formula that woul a reduction in the applicable respirable dust standard the quartz content of respirable dust in the atmosphere exceeded 5 percent. 2/ The formula, which issued in Ma 30 C.F.R. 70.101, required that whenever the "concentra respirable dust in the mine atmosphere" contained "more 5 percent quartz" the applicable respirable dust standa for that working place should be reduced by an amount c "by dividing the percent of quartz into the number 10".

1/ The operator has withdrawn its improvident assertion a "practical matter" the trial judge should take notice fact that the integrity of the entire sampling program jeopardized by allowing federal coal mine inspectors to samples. Counsel for the operator admit they have no e to support such inflammatory assertions.

2/ Section 205 constitutes a legislative recognition of iological studies show that the different co dust such as quartz and coal dust as well as concentration or density are factors which fibrotic lung tissue and the development o ssive fibrosis.

rystalline silicon dioxide) is classified a ust that causes scar tissue (fibrosis) to b when inhaled in excessive amounts. In 196 ference of Governmental Industrial Hygienis eshold Limit Value (TLV) of 100 micrograms b cubic meter of air over an eight hour period  
continued on page 6)

quartz in the dust. Based on studies done in 1929 and 1931, it was determined the toxicity limit (TLV) for quartz dust is 0.1 milligrams per cubic meter of air. The formula developed by the National Institute for Occupational Safety and Health (NIOSH) for applying this limit was: TLV equals 10 divided by the percent of respirable quartz found in a sample of respirable dust. 4/

Thus, if the quartz component of the average concentration of respirable dust during a single shift is 5 percent of a 2 milligram mass, the concentration of quartz is 100 micrograms (0.1 milligrams) per cubic meter of air and no reduction in the total concentration of respirable dust (2mg/m<sup>3</sup>) is mandated. (10/5 equals 2). On the other hand, if the respirable mass standard was 3 milligrams of air cubed, the 5 percent limit would require it be lowered to 2 (10/5 equals 2) if the quartz content exceeded 5 percent.

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the airborne concentration of quartz to which it is believed that workers, including miners, may be repeatedly exposed day after day without adverse effect. NIOSH has recommended that the concentration level be reduced to 50 micrograms (.05 milligrams) but thus far MSHA has declined to adopt this as the basis for its formula for reducing the applicable respirable dust standard. 45 F.R. 23995 (1980).

Documentation of the Threshold Limit Values for Airborne Chemicals, ACGIH, 1981 Supplement 364-365. This report states that because the "percent quartz in respirable dust is often quite different from the percentage in ... total airborne dust, ... the percent quartz for use in the respirable-mass TLV

190 micrograms of concentrated quartz dust which was twice the permissible dosage-exposure for each shift. The record shows this exposure which began some time in 1971 and continued until abated in January 1982.

The quartz standard issued in March 1971 and without substantive change in April 1980. 45 F.R. From the inception of the enforcement program to the present, the procedure for evaluation of respirable quartz was known as the Standard Method A7, or KBr (Potassium bromide) method. To perform the necessary chemical analysis by infrared spectrophotography a sample of respirable dust weighing 1 to 4 milligrams was required. Because the amount collected during a mine health inspection usually was less than this amount it was often necessary to collect 10 to 30 samples to make a composite sample of 1 to 4 milligrams. The composite sample was then ashed, combined with potassium bromide, pelletized and analyzed for quartz content by an infrared spectrophotograph of the absorbance of the crystalline silicon dioxide.

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5/ Apparently through inadvertance the phrase "concentration of" was deleted before the words "respirable dust" in the rule as reissued. Since no notice was given of an intent to change the statutory definition found in section 101 of the Act, it seems obvious the Secretaries did not intend to change the "average concentration" standard.

when quartz determination could be made. For example, in 1980 approximately 59,000 samples were collected and submitted for quartz analysis. From these, only 1,500 quartz analyses could be performed.

To increase the number of samples available for testing MSHA modified its analytical method in February 1981. The new method permits a quartz content determination to be made on a single sample containing as little as 0.5 milligrams of respirable mine dust. It was first developed by the National Institute of Occupational Safety and Health (NIOSH) in 1977.

Under the new method, the sample is ashed in a low-temperature, radio-frequency (RF) asher, the ashed residue is combined with potassium bromide, pelletized and analyzed for quartz using infrared spectrophotometry. Use of the RF asher affords the advantage of being able to make a quartz analysis of a sample containing as little as 0.5 milligrams of respirable mine dust. The new method, which is capable of detecting about one percent quartz in an ashed sample weighing 0.5 milligrams is known as the Single Sample, Low Temperature Ash (LTA) method of quantifying the quartz in a single valid sample of respirable mine dust. Mine Safety and Health Administration's Procedure for Determining Quartz Content of Respirable Coal Mine Dust

This showed that quartz determinations with the "new" method were within approximately 1 percent of the determinations obtained with the "old" method (i.e., for a determination of 8 percent with the "old" method, the determination with the "new" method would be 7, 8 or 9 percent). In addition, single samples were analyzed to quantify the inter-shift variability of the "new" method. This showed the variability of quartz was 17 percent as compared to the "old" method which was 10.8 percent. The difference in variability was of no practical significance since the results of quartz determinations are truncated and reported as whole percentages, that is, an analysis that results in a determination of 4.5 percent quartz is reported as 5 percent.

The variability of disparate samples is admitted on a limited amount of data. Samples to determine inter-shift or multi-shift variability were collected from five different sections. From a quantitative standpoint, 80 percent of the time the average standard deviation about the mean was determined from at least five samples, was 2 percent. For shift samples, i.e., those collected from the same section on the same day, the variability was within a range of plus or minus 1 percent. The evidence shows, and the operator would not dispute, that the variability between and among the



operator claims all this is irrelevant because, the sample method fails to comply with the requirement quartz determination be based on averaging five of respirable dust. 30 C.F.R. 207.

dispositive issue, therefore, is whether the limit on quartz dust can be enforced on the basis of a single shift gravimetric sample of the atmosphere of the mining units cited or must be a composite of the multiple shift samples taken to determine compliance with the respirable mine dust concentration.

If support for the operator's position is found, it is claimed, the determination that "a single-shift respirable dust sample could not be relied upon for compliance determinations because the respirable dust concentration being measured" is near the limit. 45 F.R. 23997 (1980). Pointing out that each sample in question was less than 2 milligrams, the court argues the sampling procedure followed to determine compliance was not a valid statistical technique because it failed to meet the long-established requirement for multiple samples and averaging. 30 C.F.R. 207.

The Secretary's answer is that the statute does not require multiple sample averaging to determine the concentration of quartz dust. Section 202(f)(2). MSHA further

nor the Secretary, it is argued ever intended the pre-com quartz sample, i.e., the sample used to establish the low dust standard, be derived from a statistically valid sample of the average concentration of the total airborne respirable dust to which the miners were exposed. The Secretary carries his burden, it is claimed, if he shows persuasively that, after applying valid statistical techniques, a single shift sample of respirable mine dust pictures, with scientific accuracy, the concentration of respirable quartz dust in the atmosphere during the shift on which the sample was taken.

Since a single shift sample of each of the continuous miner operators (high risk occupations) cited showed a quartz concentration of 11 percent, the Secretary claims he had discretionary duty to lower the total respirable dust standard to .9 milligrams of air cubed and thereafter to enforce that standard on the basis of multi-sample averaged "composite" samples. 6/

6/ While the Secretary claims single shift samples are never used to find a violation, one of the "Enforcement Examples" given in the directive to inspectors states that where an analysis of a single sample from an area subject to a low standard has generated an even higher concentration or percentage of quartz, "the inspector should issue a citation upon receipt of the quartz analysis because there was a violation at the time the sample was collected". Coal Mine Safety & Health Memorandum No. 81-183-H, p. 8.

Section 205 provides:

coal mining operations where the concentration of respirable dust in the mine atmosphere of any working place contains more than 5 percent quartz, the Secretary of Health, Education and Welfare shall prescribe an appropriate formula for determining the applicable respirable dust standard under this title for such working place and the Secretary of Labor shall apply such formula in carrying out his duties under this title.

Section 202(e) provides:

References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare.

Section 202(f) provides:

For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretaries, and (2) as measured thereafter, over a single shift only, unless the Secretaries find, in accordance with the provisions of section 101 of this Act, that such single shift measurements will not, after applying valid statistical techniques, to such measurement, accurately represent such atmospheric conditions during such shift.

The legislative history of section 202(f) shows there was a sharp disagreement between the Senate and House over the most reliable method for sampling atmospheric conditions to determine the "average concentration" of respirable dust.

the operators' interests succeeded in persuading  
to adopt an amendment that would have required mu  
sampling to determine the "average concentration"  
matter was finally resolved in the Conference Con  
report states:

The substitute adopted by the conference rec  
the operator to maintain continuously the a  
concentration of respirable dust in the mine  
atmosphere during each shift to which each m  
is exposed at or below the established maxim  
standard or the permitted maximum standard.  
also provides that the term "average concen  
means that for a maximum period of 18 months  
enactment, measurements of a minimum number  
the same production shifts in consecutive o  
are authorized to obtain a statistically va  
sample. At the end of this 18-month period  
requires that the measurements be over one  
duction shift only, unless the Secretary and  
Secretary of Health, Education and Welfare  
in accordance with the standard setting prov  
of section 101, that single-shift measuremen  
will not accurately represent the atmospheric  
conditions during the measured shift to whic  
miner is continuously exposed. H. Rpt. 91-  
91st Cong., 1st Sess., 75; Legislative Hist  
Coal Act 1037 (1970).

From this, it is clear that the legislative pref  
for single shift sampling and that multi-shift av  
is the exception, not the rule. The operator, in  
concedes that "the Secretaries have never expres  
that a single shift sample will not accurately re  
/the average concentration of respirable quartz o

techniques mandates continued use of the exceptional method, multi-sample averaging as the basis for the issuance of citations to enforce a lowered standard. 45 F.R. 23997.

I find that as a matter of law, section 202(f) of the Act plainly authorizes use of single shift samples as the basis for determining the concentration of quartz and that the best available scientific evidence supports use of such procedure.

The operator has chosen not to challenge the evidence produced by the Secretary to show that, after applying valid statistical techniques, a single shift sample of respirable dust can be analyzed by a method which accurately measures the concentration of respirable quartz dust in the atmosphere during that shift. 7/ Instead it has generally cited studies relating to the validity of gravimetric measurements of respirable coal mine dust masses.

There is, of course, no dispute about the fact that personal gravimetric samplers were used to collect the respirable dust in question. Furthermore, the relevant literature shows that true dust concentrations in coal mines vary from

The operator's claim that the standard as applied arbitrarily reduces the total dust level no matter how insignificant the amount of quartz present is demonstrably incorrect. (Exh. 2). The operator makes no claim that exposure to more than 100 micrograms of respirable quartz dust for eight hours a day, day

dust concentration in the atmosphere of a continuous operator has a standard deviation of 70 percent. I Respirable Dust Measurement 13-14 (1977).

But, says the Secretary, all this is irrelevant after applying valid statistical techniques to the spectroscopy method of analyzing single shift samples of quartz it was found that the variability between single and multiple samples was relatively low, plus 1 or 2 percent. Indeed, this conclusion seems to be corroborated by a study done by the operator's own hygienists in 1970 or 1971. This study found it was using an x-ray diffraction technique to "estimate the amount of quartz and calcite on individual filters where the dust load was 0.20 mg." The same report recommended that infrared techniques being used in England and Germany be carefully studied to "determine whether this analytical procedure can be applied to individual respirable dust samples". The Secretary's claims, and I find its evidence supports the conclusion that by 1981 the infrared technique had been perfected to the point where it could be applied to samples with dust loads as low as 0.5 milligrams of dust with the reproductibility (coefficient of variation) between single and multiple samples so small as to be negligible.

sample because only 0.5 milligrams of dust is analyzed  
in each instance to determine the quartz content. As a  
practical matter, of course, it makes quite a difference  
in the time and effort required to work with  
more than one sample. 8/  
The percent quartz content, as previously indicated, is  
used as a standard but only as a factor in the formula  
for reducing the total respirable dust mass. The object is  
to keep the quartz exposure within the permissible limit.  
For example, if a 7% quartz content of a .7 milligram sample  
is used to reduce the 2 milligram standard to 1.4  
milligrams does not mean that a 49 microgram standard for  
quartz is being enforced. A simple calculation shows the  
quartz content of the .7 mg sample would have to reach 14%  
if it would equal 100 micrograms (.7 mg equals 700 ug X  
14% equals 98 ug). The formula, on the other hand, is designed  
to ensure that the quartz content of the reduced standard  
does not exceed 100 micrograms or 0.1 mg quartz/m<sup>3</sup>  
(.7 mg/m<sup>3</sup> X 7% equals 0.1 mg/m<sup>3</sup> quartz). Obviously, if  
an employer is achieving a .7 mg/m<sup>3</sup> concentration of respirable  
dust, he will have no difficulty in complying with the lowered  
quartz standard.

It is estimated that the use of the single sample procedure  
will result in a 50% reduction in the number of samples collected.

(representative samples) of the average concentration of dust in the relevant atmosphere during the shifts in question. The operator's contest of the validity of the pre-cooling samples, i.e., those used to lower the total dust standard is, therefore, denied.

### III

The operator claims the violations in question are "significant and substantial" because there is no previous evidence that exposure of miners to free silica (quartz) generated "naturally in mining" is a significant health hazard. The Secretary responded with a report and supporting data from the National Institute for Occupational Safety and Health (NIOSH). This report concluded that an "intermittant or continuous" exposure to more than 100 micrograms per cubic meter of respirable quartz dust, regardless of the size of the total respirable dust mass, "constitutes a serious and substantial hazard to the health of miners." (Exhibits

g affidavit and the NIOSH report provide the following: The operator failed to understand that the threshold limit value of 2 milligrams per cubic meter of air for quartz dust is based on the resultant of the formula used to reduce the 2 milligram standard when the free silica content of an analyzed sample exceeds 5 percent. The 100 microgram limit is a constant that does not vary with the size of the sample analyzed and is used solely as a regulator of the permissible respirable dust mass of 2 milligrams. The purpose of the 100 microgram limit is to insure that the concentration of respirable quartz dust in the atmosphere is maintained at or below 100 micrograms per cubic meter of air.



micrograms) in the presence of coal dust results in a synergistic effect that exacerbates the health risk involved in exposure to respirable mine dust. The Secretary argues that he intended a finding of "significant and substantial" health hazard whenever an "incipient" health hazard can, on the basis of the best available evidence, be said to pose a significant risk of material health impairment over the long run. Finally, the court claimed that a finding of "significant and substantial" health hazard is warranted wherever the fraction of free silica in the mine

sample, if a single analyzed sample weighs .5 milligrams and the free silica content is 6 percent, the 2 milligram standard will be reduced to 1.6 (10/6 equals 1.6 mg). After compliance is measured against the reduced respirable standard of 1.6 mg, not the threshold limit of 100 micrograms for quartz. The fact that the quartz content of the sample analyzed weighed only 25 micrograms (.5 mg equals 500 ug x 5% equals 25 ug) is irrelevant and does not mean that 25 ug "standard" is being enforced when the limit is 1.6 mg. It simply means that since the compliance or enforcement standard is 1.6 mg the actual amount of quartz in the environment may regress to 100 micrograms or 20 percent of the mass (.5 mg equals 500 ug x 20% equals 100 ug) before the reduced standard (1.6 mg) would be violated. In the case at hand, it appears the analyzed samples were 1.7 mg and contained 11 percent quartz. This means the analyzed sample had 190 micrograms of quartz ((.11) (1.7)) equals 190 ug per meter cubed or 190 ug per meter cubed). The compliance or compliance samples averaged 1.3 mg and 1 mg respectively. This means that in the case of the 1.3 mg sample the quartz content may have been approximately 15 percent (1.3 mg/.19 mg equals 0.146%) and in the case of the 1 mg sample approximately 19 percent (1 mg/.19 equals 19%).

or continuous" exposure to any concentration of quartz dust in excess of the established hygienically safe level of 100 micrograms per meter of air cubed and more particularly a concentration of 11 percent (190 micrograms) in a respirable dust mass of 1.7 milligrams "constitutes a serious and substantial hazard to the health of a worker". 10/ (Exhibit 3). The operator offered no fact-specific rebuttal to this evidence. Thus, the matter is before me on the operator's claim that the Secretary's evidence is, as a matter of law, insufficient to establish the violations charged were "of such nature and degree as could have significantly and substantially contributed to the cause and effect" of a mine health hazard. 11/ Section 1

10/ 1.7 milligrams was apparently the weight of the single samples analyzed for quartz (11% x 1.7 mg equals .19 mg or 190 ug). Inasmuch as the compliance samples averaged 1.3 and 1 milligrams, respectively, it appears that the concentrations of quartz involved in the violations charged ranged 190 to 200 micrograms. This was substantially in excess of the permissible exposure limit value of 100 micrograms.

11/ Although the matters are before me on the parties' contentions for summary decision, each has the burden of showing the indisputability of the facts which warrant judgment in his favor. Moore's Federal Practice Par. 56.13. The Secretary's evidence clearly establishes that the 100 plus microgram limit is indisputably accepted by the scientific and medical community as the safe limit for exposure to free silica. The operator does not challenge this but claims such an exposure does constitute a "significant and substantial" health hazard (footnote 11 continued on page 20)

and on what is known and uncontradicted may in and of itself constitute substantial evidence when first-hand evidence on the question is unavailable. Industrial Union v. American Petroleum Institute, 448 U.S. 607, 707 (1980), Dissenting Opinion; Hardison v. Parales, 402 U.S. 389 (1971). I note that the NIOSH report and its supporting documentation are part of the stipulated record the operator, in the face of that report, continues to stand on its cross motion and offered no evidence to contradict the report. With the operator in this posture, I am free to infer there is no evidence other than the pleadings and supporting instruments

use there is no evidence that the inhalation of quartz generated naturally increases the risk of developing silicosis or black lung in either the short or long term. bald assertion is unsupported by any medical or scientific evidence. It apparently depends upon a claim that an examination of studies conducted in Great Britain concerning the relationship between quartz dust and the development of miners' pneumonocoiiosis shows there is no correlation. The studies are unidentified and were not submitted for record. The NIOSH report, on the other hand, deals specifically with this issue and concludes the weight of reputable scientific and medical thought is that "a key factor in the development of silicosis is the duration of exposure multiplied by dust concentration". (Exhibit 3, Para. 8). The studies submitted to NIOSH, and not disputed by the operator, also show that quartz must be regarded as a possible cause of black lung, especially where mixed dust exposure may be low, but the proportion of quartz high". (Exhibit 3, Reference 7, p. 1275; Reference 11, pp. 123-125, Reference 14, p. 191).

Manetas v. International Petroleum Carriers, Inc.  
414 (3d Cir. 1976); Commission Rule 64. My review of the parties' materials leads me to conclude there is no real issue of fact with respect to the charge that the violations cited were "significant and substantial".

I deal first with the Secretary's claim that the concentration of quartz in excess of the 100 micrograms per cubic foot by section 205, 30 C.F.R. 70.101, is per se a significant and substantial violation.

Silicosis is a condition of massive fibrosis of the lung, marked by shortness of breath. It results from the inhalation of silica dust, is dose and time dependent and is incurable. Only technical preventive measures can control or eliminate the problem. A description of silicosis, extracted from a primer prepared for the purpose, illustrates the disease's progress.

It is shortness of breath, at first only during physical activity, but later, even at rest and with less and less exertion, until the victim is short of breath even at rest. It is caused by many small round nodules that develop from irritation by silica dust and hard inelastic scars -- just like the scars that result from an operation on the lung, so stiff, so that it takes more effort to breathe them with air. The scars are in the walls of the air sacs, blocking the passage of oxygen into the blood; tired blood

reaction to the silica may cause scars to join into larger scars; some may occupy the entire lung. This process, progressive massive fibrosis, is frequently accompanied by increasing susceptibility to tuberculosis and other infections. Finally, the heart, which must pump blood through these stiff, inelastic lungs, becomes weakened and enlarged and fails to pump effectively. 12/

Silicosis is a "continuum" or progressive disease. The amount of silica estimated to be inhaled in 50% of those who die from silicosis is 5 grams. (Exhibit 3, Reference 5).

It is about one-half a teaspoon. While there is some uncertainty over the manner in which the disease progresses from its least serious to its disabling stage, it is certain that prolonged exposure above safe limits contributes to the progression. It also appears that a severe stage of the disease may result from brief as well as intermittent or interrupted exposure. (Exhibit 3, References 5, 6). In its most serious form, silicosis is a chronic and irreversible destructive pulmonary disease that like black lung or in combination with black lung can create an additional strain

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Stellman and Daum, Work is Dangerous to Your Health, Vintage Books, New York (1973), 168. Only dust containing free (uncombined) silica can cause silicosis. The disease is one of the pneumoconioses, a group of lung diseases which result from inhalation of excessive amounts of respirable dust in industrial environments such as mining, quarrying, foundries and textile mills. See, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 420 (1981).

in the development of black lung, the present consensus in reputable medical and scientific thinking is that quartz dust exposure in excess of the established and accepted threshold limit of 0.1 milligrams per cubic meter of air may be an important factor in the development and rapid progression of coalworkers' pneumoconiosis. In fact, there is no discernable disagreement over the fact that exposure of miners to high concentrations of free silica (in excess of 5%) may, standing alone, or when mixed with coal mine dust trigger over the short or long run, depending on individual susceptibility, adverse pathogenic or fibrogenic reactions in lung tissue. 13/

13/ Contrary to the operator's contention, the statute does not restrain MSHA from acting to prevent irreversible health damage until miners actually suffer the early symptoms of silicosis or black lung. Instead the law is a mandate to reduce the exposure to that irreversible damage--especially for those miners who have regular exposure to the causal agent, respirable mine dust. MSHA and NIOSH have adequately documented that the disease is attributable to continued exposure to dust. The evidence shows that the acute symptoms of silicosis, occurring in conjunction with black lung (anthracosis), damage the pulmonary system and increase his or her susceptibility to the adverse effects of subsequent pathogenic agents. Sections 106(a)(6), (7), 202, 205 and 207 of the Act, read together with Exhibit 3 and its attachments, clearly establish that the liability for black lung is a liability in fact. For these reasons, I hold that the exposure to quartz dust that passes the threshold of the permissible exposure level of 100 micrograms per cubic meter is a significant and substantial exposure to quartz dust that passes the threshold of the permissible exposure level of 100 micrograms per cubic meter.

is was a severe health problem in the United States. , the United Mine Workers of America and the Pennsylvania Department of Labor and Industry surveyed pulmonary disease anthracite miners. 14/ This study confirmed that the old or permissible quartz concentration of a respirable mass should not exceed 5 percent.

In 1950 the U. S. Department of Interior, Bureau of Mines, and the literature on dusts, with emphasis on the relationship to dust diseases. Efforts to control industrial dusts historically relied on the medicolegal principle of dose response. This principle holds there is a systematic relationship between the severity of a response to an industrial dust such as quartz and the degree of exposure. This is based on the concept that the magnitude of toxicity of quartz dust is proportional to its concentration in the respirable coal mine dust mass. Thus, as the level of exposure decreases there is a decrease in the risk of injury, and risk becomes negligible when exposure falls below tolerable (threshold or permissible) levels or concentrations. (Exhibit 3, Reference 3).

Ward, Anthracite-Silicosis Among Hard Coal Miners, U.S. Health Service Bulletin #221 (Dec. 1935).

Weighted Average (TLV-TWA) Respirable  
this formula as the percent of quartz increases the allowable  
total respirable coal mine dust mass is decreased. 15/ This  
is the type of formula which Congress had in mind in enacting  
section 205 and from which the Secretary of HEW derived the  
formula promulgated in 30 C.F.R. 70.101. 42 F.R. 59294  
(1977). It is specifically designed to accommodate the 2  
milligram limit on the total respirable dust mass in surface  
and underground coal mines.

NIOSH and the ACGIH continuously review and monitor  
the toxicity of airborne contaminants to determine the safe  
concentrations to which most workers can be exposed without  
endangering health. TLV-TWA's and NIOSH's criteria papers  
(Exhibit 3, Reference 8) are based on the best available  
evidence from industrial experience, from experimental human  
and animal studies, and, when possible, from a combination  
of the three. 16/ The medical and scientific basis for the

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15/ Documentation of Threshold Limit Values, (ACGIH, 4th ed.  
364-365 (1981). The formula was first adopted in 1968 based  
on work done by Ayer. See, Ayer, H.E., The proposed ACGIH  
mass limits for quartz: Review and Evaluation. Am. Ind.  
Hyg. Assoc. J. 1968; 29:336-342; Id. 30:117 (1969).

16/ TLV's Threshold Limit Values for Chemical Substances and  
Physical Agents in the Workroom Environment (1982), at 2.



for quartz dust has been incorporated in an improved standard, 30 C.F.R. 70.101, it has the force and effect

Applying the formula to the cases in question, the agency reduced the applicable 2 milligram standard to .9 mg. Thereafter compliance or enforcement sampling showed the lowered standard had been violated. The operator does not dispute this. It is clear that the violations did, in fact occur.

Further a preponderance of the evidence shows that for years the medical and scientific communities have accepted as established fact that the exposure of miners to free silica concentrations that exceed 5 percent of the total respirable dust in their environment poses a significant risk to short and long term health. 17/ (Exhibits 2, 3).

It is obvious that in enacting section 205 Congress made a conscious decision to call upon the expertise of NIOSH and MSHA and to delegate to them the authority to make a determination that would strike a balance between what is not the safe upper limit of quartz exposure.

In fact, NIOSH has urged that the limit be reduced to 2.5 mg or 50 micrograms. 42 F.R. 23995 (1980).

and deliberation in a lengthy public rulemaking process. The operator's suggestion that the formula was plucked out of thin air and arbitrarily applied is clearly mistaken.

I find there is an indisputable correlation between the level and duration of exposure of the respiratory system to free silica and the development of fibrogenic tissue in the lungs. Where, as here, the exposure substantially exceeds the threshold limit for an extended period of time and as to the significance of the risk of a material health impairment must be resolved in favor of the miners. 18/

18/ When Congress enacted section 101(a)(6) of the Act in 1977, it recognized that the validity and enforceability of health standards should be judged by criteria that are different than those applied to safety standards. The Supreme Court has confirmed this. See Industrial Union v. American Petroleum Institute, 448 U.S., supra, 649; American Textile Mfgs. Inst. v. Donovan, 452 U.S. 491, 512 (1981). Indeed in the Benzene case the Court held "so long as an agency's findings as to the safe level of a toxic or carcinogenic substance or physical agent are supported by a body of reputable medical and scientific thought, the agency is free to use conservative assumptions in interpreting the data . . . risking error on the side of overprotection rather than underprotection". Industrial Union, supra, 656. It is axiomatic that occupational health legislation is to be liberally construed to effectuate the Congressional purpose. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13

find the Secretaries' complementary determination of the line between the safe and the unsafe while not demonstrably with mathematical nicety accords with the best available medical and scientific evidence. This, I believe, is all that is required. Compare American Textile Mfgs. Inst. v. Donovan, 452 U.S., supra, 495-504, 509. Indeed in view of the legislative determination that the dose response curve is to be set at a 5 percent concentration in a total respirable dust mass of 2 milligrams (0.1 mg) any attempt to alter the curve and thereby reduce the protection afforded the miner by the existing standard would fall afoul of section 101(a) of the Act unless and until it can be shown that a less stringent standard will provide the same protection. 19/

The operator's reliance on Consolidation Coal Company v. Secretary, 4 FMSHRC 1559 (1982) is misplaced. There the court judge vacated an S&S charge on the ground the Secretary failed to

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19/ Section 101(a)(9) provides that "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard". A rejection of the S&S charge would tantamount to a finding that exposure to quartz dust above the threshold or safe level is insignificant or de minimis and the risk insubstantial. This would vitiate the deterrent effect of the S&S charge and run counter to the Congressional purpose that underlies section 104(e).

A preponderance of the probative medical and scientific evidence in these cases shows there was a measurable relationship between the concentrations of respirable quartz and the pulmonary disorders of miners regularly exposed to such concentrations. There is therefore substantial evidence to support the conclusion that the concentrations in question "could be a major cause of a danger to . . . health".

v. National Gypsum Company, 3 FMSHRC 822, 827 (1981).

I am mindful that the statute does not require exposure to fibrogenic concentrations of quartz dust to constitute an imminent health hazard, only a "reasonable likelihood of an . . . illness of a reasonably serious nature" during a miner's normal working life as the result of such exposure. National Gypsum, *supra*, 828. It is undeniable that such exposure is an illness of a "reasonably serious nature". Furthermore, the undisputed medical and scientific evidence shows that even intermittent exposure creates a "likelihood" or "possibility" that a one-time (single shift) exposure could lead to a serious health impairment or functional disability. Indeed, unless the threshold limit is to be rendered meaningless, it must be accorded the status of the determinant because it is and is not significant and substantial. A statute

on 101(a)(6) of the 1977 amendments to the 1969  
adopted almost in haec verba the language of section  
the Occupational Safety and Health Act. 20/ Under  
ction 101(a)(6), the validity of procedures and  
designed to attain "the highest degree of health  
protection for the miner" are to be judged by  
e Secretary has shown by the "best available evidence"  
s more likely than not" that the permissible exposure  
plus micrograms) presents a significant risk of  
health impairment. Industrial Union v. American  
st., 448 U.S. 607, 653 (1980). This standard  
s a recognition by Congress of special problems in  
health risks as opposed to safety risks. Id. at 649,  
American Textile Inst. v. Donovan, 452 U.S. 490,  
. As the Court noted, in the case of safety hazards  
are generally immediate and obvious, while in the  
alth hazards the risks may not be apparent until  
ly difference was the omission of the "feasibility"  
t found in the first sentence of section 6(b)(5).  
lity" requirement is, however, to be found in  
sentence of section 101(a)(6). The operator  
claim that the 100 microgram standard is technologically  
cally infeasible.

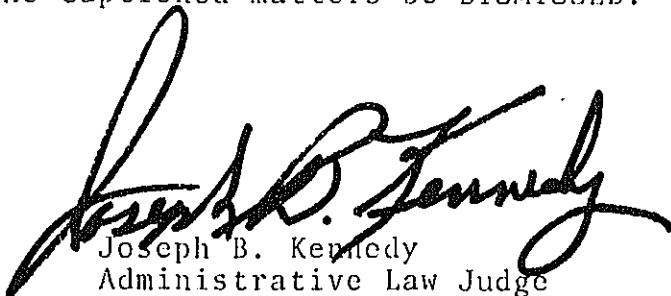
of possible future events and extrapolations from limited data. Industrial Union, supra, at 655-656; American Textile Mfgs., supra, at 495-505, and n. 25. This does not mean that MSHA is clothed with unreviewable discretion. What it does mean is that MSHA's mandate necessarily requires it to act, even where information is incomplete, when the best available evidence indicates a serious threat to the health of miners. At the same time, to support a finding that a health hazard is significant and substantial MSHA has a duty to pinpoint the factual evidence and the policy considerations upon which it relied. This requires explication of the assumptions underlying predictions and extrapolations and of the basis for its resolution of conflicts and ambiguities. Thus, as I view the matter a Commission trial judge must examine not only MSHA's factual support, but also the "judgment calls and reasoning that contribute to its final decision. American Federation of Labor, ETC. v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979), affd. 452 U.S. 490 (1981); Industrial Union Dept. AFL-CIO v. Hodgson, 499 F.2d 467, 475-476 (1974).

21/ Congress wanted the Secretary to protect miners not only against known harms, but also against risks of harms not wholly understood. Comparable provisions in the OSH Act have been construed to embrace protection from the "subclinical effects" of a toxic substance. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1251-1252 (D.C. Cir. 1980). Use of the S&S clause to deter violations is consistent with the Act's purpose.

retary and NIOSH are legally sufficient to support charges.

Order

premises considered, it is ORDERED that the contestations in question be, and hereby are, DENIED. It is ORDERED that for the violations of 30 C.F.R. and the operator pay a total penalty of \$198 and that to payment the captioned matters be DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

on:

W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA (Certified Mail)

Symons, Esq., U.S. Steel Mining Co., Inc., 600 Street, Pittsburgh, PA 15230 (Certified Mail)

B &amp; B MINING, INC.,

Respondent

:

DECISION APPROVING SETTLEMENT

This proceeding involves two complaints of discharge or interference filed by Roger L. Hall against B & B Mining to section 105(c)(3) of the Federal Mine Safety and Health Act. The complaint filed in Docket No. VA 79-128-D alleges that respondent discharged Hall on or about June 4, 1979, in violation of section 105(c)(3) of the Act. Respondent alleges that it discharged Hall because he requested more days of work without obtaining permission to be absent. Respondent contends that he was discharged because he requested that the Health Administration conduct a special inspection of respondent's mine. Hall requested an immediate arbitration hearing with respondent on or about June 4, 1979, and, as a result of that hearing, Hall was reinstated to his prior position and awarded back pay.

The complaint filed by Hall in Docket No. VA 80-170-D alleges that respondent again discharged him on or about April 7, 1980, in violation of section 105(c)(1) of the Act. Hall claims that respondent discharged him for 1 week and 2 days. When the miners were called back to work, respondent alleges that he asked that the mine be inspected before the miners returned to work. The primary reason for requesting the inspection was respondent's claim that respondent was using 12-inch roof bolts which were labeled as 36-inch bolts. Management denied Hall's request for 2 days of personal leave which, Hall says, were granted. Hall then claims that when he returned to work, he was discharged. Respondent's answer to the complaint in Docket No. VA 80-170-D alleges that Hall was discharged for illegal picketing activities.

These cases were first assigned to Administrative Law Judge Laurensen who convened a hearing in Abingdon, Virginia, to consider the issues raised by the complaints. At the hearing, respondent stated that respondent had filed a petition for Chapter 11 bankruptcy protection on February 21, 1980, and that the filing of a bankruptcy petition stays all proceedings against a corporation until a partial order of protection from the bankruptcy court to proceed. Judge Laurensen stated that he was required by the provisions of 11 U.S.C. § 362 to continue the cases until counsel for complainant had obtained an order from the bankruptcy court to proceed.



Judge Laurenson rescheduled a hearing after permission to proceed had been obtained from the bankruptcy court, but that hearing had to be canceled because of budgetary constraints. Judge Laurenson again scheduled the case for hearing, but that hearing also had to be canceled when Judge Laurenson became one of the judges who were subject to a reduction in force.

The cases were thereafter reassigned to me and I issued a prehearing order on February 12, 1982, requesting that the parties provide answers to basic factual and procedural questions by March 12, 1982, but the time for answering had to be extended so that respondent's newly assigned counsel could obtain records from the former counsel who had withdrawn. Thereafter, additional extensions of time had to be granted because complainant's counsel was forced to undergo surgery for a serious back problem which involved a long period of post-operative recuperation.

The cases were finally scheduled for hearing on January 11, 1983, in Alexandria, Virginia. Before a formal hearing had begun, I asked counsel for the parties if they had discussed settlement. Complainant's counsel stated that he had not tried to settle the cases with the lawyer who was now representing respondent, but that he had tried unsuccessfully to settle the cases with respondent's former attorney. Counsel for respondent indicated that he was quite willing to discuss settlement. Therefore, the parties were given an opportunity to discuss settlement. Shortly thereafter, counsel for complainant advised me that the parties had reached a settlement agreement in which respondent had agreed to pay complainant an amount of \$1,300 with respect to the complaint filed in Docket No. VA 79-128-D and an amount of \$700 with respect to the complaint filed in Docket No. 80-170-D, or a total of \$2,000 for both cases, including attorney's fees.

I find that the settlement agreement should be approved. Complainant had obtained a job with another employer after his second discharge and there was not a long period for which back pay could have been required if a hearing had been held on the merits and an outcome favorable to complainant had resulted. Additionally, in view of the fact that respondent was now involved in formal bankruptcy proceedings, the usual relief of reinstatement of complainant to his former position would not be possible.

WHEREFORE, for the reasons hereinbefore given it is ordered:

(A) The parties' settlement agreement is approved.

(B) Within 30 days from the date of this decision, the complaint filed in Docket No. VA 79-128-D shall be considered satisfied and dismissed upon payment by respondent of \$1,300.00 to complainant and the complaint in Docket No. 80-170-D shall be considered satisfied and dismissed upon payment by respondent of \$700.00 to complainant.

### Issues

The issues presented in these proceedings include (1) whether named respondents have violated the provisions of the Act and regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against each respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. The issues raised by the parties are identified and disposed of in the body of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve compliance after notification of the violation.

Additional issues, as stated by petitioner MSHA in its petition for review, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?
2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?
3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?
4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

tions, and is not now, an operator, agent, or independent contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.

All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.

The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

### Discussion

Thursday, July 30, 1981, a fatal blasting accident occurred at Doan Coal Company's strip mine, No. 1 Pit (stock pile area). A miner, a laborer employed by Doan Coal Company, was observing a blasting operation from a stock pile, and while seated at, or running to, a location, was struck by flyrock and other debris from the blast. The blasting work was being performed by Austin Powder Company, a subsidiary of a licensed blaster, Jeffrey Lucas and his crew, and the work was performed at the specific request of Doan Coal Company, who has its own experienced blasters of its own. MSHA conducted an investigation of the accident, and at the conclusion of same issued the three citations. All of the citations charge the named respondents with violations of mandatory safety standard 30 CFR 77.1303(h), which provides as follows:

Ample warnings shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The citations which were issued in these proceedings were issued as a result of an investigation conducted by MSHA to determine the facts and circumstances surrounding a fatality which occurred when a miner was struck by flyrock during blasting of overburden. None of the conditions cited as alleged violations were actually observed by the inspectors, and they issued the citations on the basis of information furnished to their attention during the investigation. Two of the citations were issued to respondent Austin Powder Company by MSHA Inspector Lyle F. Bixler as follows:

*Richard C.*  
Richard C. Steffey  
Administrative Law  
(Phone: 703-756--

Distribution:

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Roger L. Hall, Route 2, Box 465A, Chilhowie, VA 24311

Special Investigations, MSHA, U. S. Department of Labor  
Boulevard, Arlington, VA 22203

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

AUSTIN POWDER COMPANY,  
DOAN COAL COMPANY,  
Respondent

: Civil Penalty Proceedings  
:  
: Docket No. PENN 82-63  
: A.O. No. 36-02695-03001 F E24  
:  
: Docket No. PENN 82-33  
: A.O. No. 36-02695-03012 F  
:  
: Doan Strip Mine  
:

### DECISIONS

Appearances: Robert Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; William M. Ha Esquire, Cleveland, Ohio, for the respondent Austin Powder Company; Robert M. Hanak, Esquire, Reynoldsville, Pennsylvania, for the respondent Doan Coal Company.

Before: Judge Koutras

### Statement of the Proceedings

These proceedings involve proposals for an assessment of civil penalties brought by the petitioner against the respondents pursuant to § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978), for three alleged violations of 30 C.F.R. § 77.130. The citations were the result of a blasting fatality which occurred at the Doan Strip Mine on July 30, 1981, and a resulting MSHA accident investigation with regard to that fatality. One of the citations was issued on July 31, 1981, and was served on the respondent Doan Coal Company, the operator of the mine in question, and the other two were issued on July 31 and August 6, 1981, and were served on the respondent Austin Powder Company, an explosives company who MSHA claims was performing blasting activities on the mine property.

The cases were heard in Pittsburgh, Pennsylvania, and all parties appeared and were represented by counsel. All parties were afforded an opportunity to file posthearing proposed findings, conclusions, and briefs. MSHA and respondent Austin Powder filed post-hearing arguments but respondent Doan Coal Company did not, but has opted to join the arguments advanced by Austin Powder. All arguments presented by the parties, including those made at the hearing on the record, have been considered by me in the course of these decisions.

Issues

The issues presented in these proceedings include (1) whether named respondents have violated the provisions of the Act and imp. regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against each respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. All issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve compliance after notification of the violation.

Additional issues, as stated by petitioner MSHA in its post-hearing brief, are as follows:

1. Do the facts in this case support the conclusion that Austin Powder performed services at the Doan Strip Mine and therefore is liable under the Act for any violations resulting from the actions of its agents? Can Austin Powder limit its liability under the Mine Act pursuant to its service contract with Doan Coal?
2. Is the concept of strict liability applicable to the alleged violations of 30 CFR 77.1303(h) at issue?
3. On July 30, 1981, were the miners at the Doan Strip Mine given ample warning that a blast was about to occur?
4. If the violations of 30 CFR 77.1303(h) did occur, were they caused by the negligence of either Austin Powder and/or Doan Coal?

2. Austin Powder was not, at the time of the alleged violations, and is not now, an operator, agent, or independent contractor within the meaning of the Act, and is not subject to the jurisdiction of MSHA with regard to the actions and events alleged in this proceeding.
3. All individuals allegedly committing violations were, as a matter of law, not employees or agents of Austin Powder at the time of the alleged violations.
4. The regulation which Austin Powder is charged with violating is unenforceably vague and ambiguous, as applied to the facts here.

### Discussion

On Thursday, July 30, 1981, a fatal blasting accident occurred at the Doan Coal Company's strip mine, No. 1 Pit (stock pile area). Dennis Alvatroha, a laborer employed by Doan Coal Company, was observing the blasting operation from a stock pile, and while seated at, or running from that location, was struck by flyrock and other debris from the blast. The actual blasting work was being performed by Austin Powder Company, in the person of a licensed blaster, Jeffrey Lucas and his crew, and the blasting work was performed at the specific request of Doan Coal Company who had no experienced blasters of its own. MSHA conducted an investigation of the accident, and at the conclusion of same issued the three citations in question. All of the citations charge the named respondents with violations of mandatory safety standard 30 CFR 77.1303(h), which provides as follows:

Ample warnings shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

The citations which were issued in these proceedings were issued after the investigation conducted by MSHA to determine the facts and circumstances surrounding a fatality which occurred when a miner was struck by flyrock during blasting of overburden. None of the conditions or practices cited as alleged violations were actually observed by the inspectors, and they issued the citations on the basis of information which came to their attention during the investigation. Two of the citations served on respondent Austin Powder Company by MSHA Inspector Lyle F. Bishop are as follows:

concussion or flyrock from blasting at the No. 1 Pit in that the contracted Austin Powder Co. blaster Jeffery A. Lucas stated during testimony that flyrock fell across him and up to 30 feet behind him while he was detonating a charge. This citation will not be terminated until all persons are instructed on the hazards of flyrock. This citation was issued during an investigation of a fatal accident.

Section 104(a)-107(a) Citation/Order No. 1041345, August which states as follows:

The proper warning was not given by the contractor blaster Jeffery A. Lucas, Austin Powder Co., prior to detonation of a shot at Pit 010 of Doan Coal Co. according to the posted requirements. This is a violation of § 77.1303(h) Part 77, 30 CFR. The blast signals which were posted at the mine entrance were: 3 ten second signals, 5 minutes before blast and short pulsating signals 1 minute before blast, clear, 1 prolonged 30 second blast (air horn) according to testimony given during the investigation of a fatal blasting accident that occurred on 7/30/81 Pit 001 Doan Coal Co., the signal given was three blasts (air horn) that were sounded 30 seconds to 1 minute before the shot was detonated. This Order will not be terminated until this unsafe practice is eliminated by the employees being properly instructed on the safe procedures of blasting and such procedures are observed by an authorized Representative of the Secretary at Doan Strip mine 36 02695.

The third citation was served on the respondent Doan Coal Co. MSHA Inspector Michael Bondra, on July 31, 1981, and the corrective practices cited are as follows:

All persons were not cleared and removed from the blasting area and suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting at the No. 1 Pit (001) in that Dennis Alvatrona, laborer was fatally injured by flyrock when blasting was done. This citation will not be terminated until all persons are instructed on the hazards from flyrock when blasting is done and remove themselves to a safe area. Dav



loading trucks. He was licensed by the State of Pennsylvania at the time of the shot in question on July 31, 1981, and he gained his experience as a blaster while working part time with Austin Powder while he was in school. He stated that he was familiar with Doan Coal Company's strip mining operation, and he confirmed that he went to the mine site on July 30, 1981, for a "shot", and he did so after being requested there by Doan Coal. He stated that the mine site is some 20 to 25 miles from his office, and that prior to the shot in question he had been at the Doan strip mine four or five times a week with other blasters. In 1981, he spent 50% of his work time at the Doan strip mine performing blasting, and that he usually spends from two to five hours a day there or as long as it takes to get the job done (Tr. 23-26).

Mr. Lucas stated that when he goes to the Doan strip mine he does so in response to a specific telephone or other request from Doan Coal. He has a two or three man crew who assists him during the blasting operation, and he is in charge of his crew. He gives them their work assignments, and depending on the job, two or three vehicles are taken along with the crew. The vehicles are driven off mine property at the end of the day and are not left there. He explained that the first thing he does when he arrives at the mine site is to locate the shot area and as to determine whether the drilling has been completed. The site of the shot is given to him by Doan Coal, and his job is to load and shoot the shot. This entails the wiring of the shot, and one of his drivers will notify Doan Coal's employees where the shot will be fired, and this is usually done approximately ten minutes before the shot is fired so that everything is shut down (Tr. 26-29).

Mr. Lucas stated that blasting signs are posted "coming into" the Doan property, but not at every shot blasting area. After the shot is wired and the circuits tested, all mine machinery is shut down, and it is the usual practice for one of his truck drivers to sound a signal. The usual procedure calls for him to tell the driver to sound a signal, and he does so by means of an air horn. At the time of the shot in question, the signal used was three 20-second blasts immediately prior to the shot. The siren would be sounding for at least a minute prior to the blast, but prior to that signal, no horns would be sounded. He believed this was enough time for anyone to get out of the area because the area is actually cleared before these signals are given. He explained that it was his responsibility to clear the blasting area, and he indicated that he did so by notifying everyone initially by radio and visually. The radio notification is usually given 10 to 15 minutes before the detonation, and everyone at the mine who has a radio is on the same frequency. Those not in radio contact are notified personally (Tr. 29-33). However, he acknowledged that prior to a shot he does not actually ascertain if every employee on mine property happens to be doing before he notifies them all individually.

the signalling procedure has changed so that five minutes before the shot is fired, three 20-second blasts of a horn are sounded, prior to the actual shot there is a one minute blast (Tr. 29). He has a photograph (exhibit G-7-k), of a sign, and he indicated that he saw it but was not sure, that such a sign was posted on July 30, and that the calls for three 10-second signals five minutes before detonation, three short pulsating signals one minute before the blast, and that the calls for an "all clear" signal (Tr. 41). He believed that such a signal was given, but again was not sure since he indicated that the signalling responsibility is delegated to his truck driver (Tr. 42).

Mr. Lucas confirmed that he detonated the blast in question on July 30, that he was positioned about 300 feet away when he set it off, and he indicated that he was positioned "behind the blast", and he indicated that the blast is put into an open space or cut, and that the blast "is going the opposite direction from me" (Tr. 44). He examined the exhibits, but could not state where he was located at the time of the actual shot, but did state that it was "in from the scale house" (Tr. 45).

Mr. Lucas stated that after the shot was wired, five to ten minutes elapsed before it was actually shot, and that he observed no one in the blasting area during this time. He further defined the blasting area as "anywhere that you suspect rock might fall", and he conceded that he was responsible to make sure that anyone in that area is in a safe location or protected (Tr. 50). He confirmed that he spent the day at the Doan mine on July 30, and that he is paid by Austin Powder (Tr. 51).

On cross-examination, Mr. Lucas stated that when he arrived at the blast scene, and before setting off the shot, he secured the area by making a determination that no one was in the foreseeable danger area of the blast, and as far as he knew the area where the victim was found had been cleared. Part of the procedure for securing the area included calling the mine office over the telephone and his going to the scale house to notify persons of the blast. All blasting was shut down prior to the blast, and while he did not personally make the radio announcement, he is sure it was made (Tr. 51-52). He stated that Austin Powder's policy is to give radio warnings of impending blasts and that policy is still in use. This is in addition to the use of air horn signals and personal contact (Tr. 55). He secured the area on the day in question and he did not see the victim when the blast was secured.

Mr. Lucas confirmed that as a result of the accident, the State of Pennsylvania suspended his blaster's license for 90 days, which was restored after he took a test before the 90 days were up. (Tr. 56)

agents and that 24 holes were charged to a depth of some 45 to 50 feet. Each hole contained approximately 400 or 450 pounds of explosives, but each hole was detonated on a delayed basis, and did not go off all at once (Tr. 64). When asked how one determines what is a safe distance from such a shot, he stated that "there is no set formula for figuring the safe distance, \* \* \* it is pretty much from experience you know what the shot is going" (Tr. 66). He also indicated that a drill rig, a shot truck, and a driller's maintenance truck were all present near the blast site and that these constituted suitable blast shelters. If one is at a safe distance, there is no reason to crawl under these vehicles. The shot was triggered electrically, and he confirmed that during 1981 he was at the Doan Coal site three or five times a week performing blasting, and that 20 to 40 holes are usually charged at any given time (Tr. 69). He also confirmed that he is paid by Austin Powder Company, and that Austin Powder also provides and pays for other benefits such as vacation and insurance (Tr. 70). He does not belong to any union, and has performed blasting work for other strip mine operators similar to the work performed for Doan (Tr. 71).

Mr. Lucas stated that he was "surprised" by the blast of July 30, 1981, in relation to other shots that he had in the same cut, and a lot more fly rock came out of the holes than he had expected. Some rock weighed approximately a pound or so, and four inches diameter landed near him, but most of the material was mud. He and his crew were around the truck but no one was under it, and he was 20 feet from the truck while the closest rock fell about six feet from where he was standing. Everyone had hard hats on, and no one from his crew advised him that any rocks had fallen near where they were standing (Tr. 73). He confirmed that he was standing some 300 feet from the blast itself, and he stated that the charged holes were vertical and that the shot went out from the open end that had been charged (Tr. 74). Mr. Lucas stated that Doan Coal Company does not have any licensed blasters, and since he has been working at the Doan Strip Mine they have never had any licensed blasters of their own (Tr. 74-75).

to control the blasting area. He believed that information warning signs should be the same as the actual warning sign. He identified exhibit G-7(k) as a photograph of a warning sign for the blasting signals which are to be used, and he believed it depicted a proper or adequate warning system. He believed since the signal system depicted gives a signal five minutes before a blast, provides for pulsating blasts before the actual blast, sequence would be ample time for anyone to get clear of the area. He did not believe that a one minute signal before the actual blast would be adequate (Tr. 84-93).

On cross-examination, Mr. Williams conceded that in a mining operation where a horn blast signal possibly could be used, he would personally contact people to warn them of any imminent blast (Tr. 95). He also agreed that personal contact or radio communication would be sufficient notice to employees of any blasting. He also agreed that any means other than a posted sign would be adequate notice to employees in any given circumstances (Tr. 96-97), and he explained that in the past he stated (Tr. 98-99):

Q. So, what is posted on a sign is not determinative, is not adequate notice in a particular factual situation?

A. The sign itself should be proper as far as the signals; however, to have communication with your employees with equipment on the site, there is no doubt in my mind that this would have to do with communication to the operator, however, the sign should be sounded properly for people on the job who are not on equipment and otherwise.

Q. The important factor is to make sure that all employees do have notice that a blast is about to take place, right?

A. This is my concern. I think they should be notified.

Q. The method by which those employees are notified will carry from one situation to another, depending on the factual circumstances?

Williams also indicated that any posted sign signals should be and ever though hand signals or radio communications are used, warning signals should definitely be followed (Tr. 99).

Potempa, testified that at the time of the blast in question employed by Doan Coal doing "a little bit of everything", but no longer employed there. He was at the mine site at the time of the blast, and he stated that he arrived there in a pick-up and went to the scale house. He arrived at the mine property "about less than 10 minutes before the blast" and was on the main road and driveway leading to the scale house. No one told him to take cover, but he knew there was a possibility of being shot, and when he got out of his truck he went to the scale house to get a can of pop, but he did not go there for the specific purpose of getting out of the blast area (Tr. 100-102).

Potempa stated that the scale house is a "good 300 to 400 feet" from the area where the blast was fired, and when asked whether he believed the scale house is a designated "safe area", he replied "it depends on what you are hiding from". He believed it was probably safe from any blast, but indicated that the scale house was not posted with any warning signs. He also stated that a member of mine management, a son of the owner's grandson, told him to go to the scale house. In addition, Mr. Potempa stated that he heard the blast warning signal as soon as he pulled up in front of the scale house and he got out of his pick up. The blast went off "probably less than a minute after the last warning signal was given, and he was in the scale house when the blast went off. He looked out the window and saw "all kinds of debris thrown all over the place", but none hit the scale house, and he was close enough to cause any danger (Tr. 105).

Potempa stated that when the blast was over, he drove his truck to the stockpile area which he described as being "off to the right" from the blast area, and while he was there he observed the accident victim on the roadway leading to the stockpile. His hard hat was off, and he was standing at the edge of the stockpile. Mr. Potempa stated that he did not see the accident victim's body was "inside the blasting area", but he described as "probably about 300 feet away", but that the victim was "probably close to 300 feet" (Tr. 107).

Potempa testified that he was familiar with the posted blasting warning signs which were on the mine property, and he indicated that the signs seen on the day in question were the "same type as the sign", but he did not specifically recall how many signals were sounded. He did not pay that much attention to it because "it is really

of the blast and he also believed that he was in no danger because he was not in the blast area (Tr. 109). He observed no trucks driving around immediately before the blast, and he confirmed that he saw rock into and around the coal pile where the victim was found. He also confirmed that he could not see the blaster from the scale house (Tr. 110).

On cross-examination, Mr. Potempa confirmed that he knew the accident victim, and that when he first discovered him he was about 300 feet from the actual location of the blast. He knew that the victim was working near the stockpile on a crusher, and his normal work station would be "the back part of the stock pile" (Tr. 112). His normal work station was farther from the blasting area than where he found him (Tr. 113).

Mr. Potempa stated that he went to the scale house for some shovels for Mr. Doan's grandson Mike Stiles, and the scale house was located "on the other side of the hill from the blasting area". He heard no call over his pick-up radio because he had turned off the motor and was outside the truck. He also stated that "there wasn't a bit of danger over there" (Tr. 114). He described his normal procedure for shutting down prior to a blast as follows (Tr. 116-118):

ADMINISTRATIVE LAW JUDGE KOUTRAS: Had you just been out on the road when you heard the last one minute signal prior to the blast, what would you have done?

THE WITNESS: I would have stopped and shut the pickup off.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would you have shut the pickup off?

THE WITNESS: It is a natural thing. We always do it when they are going to shoot. If you are within so much range, because you know, the vibration, well, not too much in the pickup, but the dozer when it is run, it will crack the crank on it.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You are saying regardless of where you are on the mine site, if there is a blast, the normal procedure for all equipment is to stop it even though you are outside the danger zone?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is the procedure that you followed on those other occasions approximately the same as on this date?

THE WITNESS: Right, right.

MSHA Inspector Michael Bondra confirmed that he conducted an investigation of the blasting fatality on July 31, 1981, and he identified exhibit G-4 as a copy of the report he prepared. He stated that he measured the distance from the actual blasting location to where the accident victim was last seen and it was 223 feet. He observed large rocks and clay in the area where the victim was found, and his investigation disclosed that the victim was struck by a single large rock weighing approximately 39 pounds (Tr. 125-129).

Mr. Bondra stated that based upon interviews and measurements, he determined that there was a clear view from the area where the victim was last seen and the location where the blast occurred. The distance from the shot to the blasting portion was 300 feet, and Mr. Bondra believed that if the blaster were looking where the victim was last seen he should have seen his yellow hard hat (Tr. 130).

Mr. Bondra stated that the distance from the blasting location to the scale house was 400 feet, and that the house did not have a sign on it designating it a "safe area". In his opinion, the persons inside the house would not have been protected from a rock the size of the one which struck the victim in the event that it hit the roof (Tr. 131). The scale house had a metal roof and framed material, and he believed the rock would have gone through (Tr. 132).

Mr. Bondra identified a sketch which he made as part of his investigation report, and in which he labeled an area 100 feet long by 100 feet wide as the "blasting area". He stated that this was a mistake, and that the area should have been labeled "blasting location". The "blasting area" is defined by section 77.2, and it means "the entire area around the blasting location where the blasting is being done shall be cleared of which concussion or flyrock material can reasonably be expected to cause injury" (Tr. 136).

Mr. Bondra believed that the victim, the scale house, and the blaster and his crew were all within the "blasting area", and he reached this conclusion because flyrock and debris from the blast went beyond the areas where they were all located (Tr. 137).

Mr. Bondra confirmed that he issued the citation charging of section 77.1303(h), and he did so because the victim, the blaster, and the people in the scale house were not removed from the blasting area. He determined there were no suitable shelters by the scale house and he considered the violation to be very serious. He issued the citation to Doan Coal because as the mine operator, Doan has the responsibility to comply and cannot delegate to this to an independent contractor. He believed that Doan should have been aware of the fact that all the individuals mentioned were in the blasting area, and Doan should have seen to it that they were all removed. When asked what he believed would be a "safe haven for miners", he replied "out, say 500 feet" (Tr. 152).

Mr. Bondra confirmed that he interviewed loader operator Dennis Bloom who told him that he had received the blast warning over the radio and that he in turn gestured to the accident victim. The victim told him to go back to the scale house, and Mr. Bloom assumed that's what the victim was going to do (Tr. 153). Mr. Bloom told Mr. Bondra that his motion to the victim was to "shut down your equipment" (Tr. 155).

Mr. Bondra believed that Mr. Bloom should have seen to it that the victim went to a safe place, and that his negligence in failing to do so is Doan Coal's negligence, and that Doan Coal should also have posted the road to and from the scale house and posted someone there to guard the area (Tr. 156, 160).

On cross-examination, Mr. Bondra testified that he is not a blaster and is not trained in the use of explosives or in geology. He stated that his opinion that 500 feet would be a "secure area" was an arbitrary stab on his part, and that he does not have the background in explosives to say it is safe or unsafe (Tr. 161).

Mr. Bondra conceded that his investigation report abstract contained a statement that "the accident occurred when Dennis Bloom went to observe blasting operations" (Tr. 166). Mr. Bondra also testified that it was his reasonable belief that the victim, Mr. Alvatrona, went in to view the blasting operation" (Tr. 167). He also conceded that Mr. Alvatrona must have been notified of the impending blast before he went in to view it (Tr. 167).

Mr. Bondra confirmed further that he has never had a blaster's license, has never taken a blaster's test, had had no training in blasting, has never read any blasting literature, and does not hold himself out as an expert in explosives or blasting (Tr. 171).



ed are not verbatim (Tr. 171-173).

Bondra stated that a piece of equipment can be a blasting shelter, confirmed that a drill rig was near the blaster. He also stated rig would be a sufficient shelter if the blaster were under y close to it (Tr. 182). He believed that the blaster should be in sition in a sheltered area so he can jump back where no flying will strike him (Tr. 182). He indicated that his investigation etermine where the trucks were located, and as far as he is the only safe area within the 500 blast area was under the drill (185).

Bondra confirmed that there would be no violation if the blasting under the trucks, and while he also confirmed that he heard testify that his crew took cover by or under the trucks, he at he was not aware where the crew was (Tr. 188).

urther response to questions from the bench, Mr. Bondra stated s (Tr. 193-196):

Q. You were influenced by the fact that you had some testimony by the blaster himself that the debris went sailing over his head, right?

THE WITNESS: Yes.

Q. You came to the conclusion that these guys were in the blasting area and were not safe and were exposed to a hazard, right?

THE WITNESS: In a sense, yes.

Q. Well, I mean that is a fact, is it not?

THE WITNESS: Yes.

Q. Had the fact shown that no debris went as far as the scale house and no debris went as far as the blaster, then those two people would not have been in the blast area, would they have, in your opinion? You would not have concluded that in your report?

THE WITNESS: According to the definition of blasting area, no.

is that the only way a blaster can guarantee what the blasting area is is to blast first to find out how far the debris goes, and then blast again to make sure everybody is out beyond that; is that correct?

THE WITNESS: No. Would his experience tell him what the blast area is?

Q. Did you hear Mr. Lucas' testimony in this case that based on his experience he felt he had his men removed from the blasting area; and, later on in his testimony he said that this was an unusual blast?

THE WITNESS: Was that an opinion?

Q. Well, do not the regulations put the responsibility on the blasting man to determine what a reasonable distance is?

THE WITNESS: Yes.

Q. I am trying to determine what is the blasting area. What if the blaster came to you and said, Mr. Inspector I would like you to give me your opinion of what you believe the blasting area is. I have 24 holes loaded and we are ready to shoot. Before I shoot, I want to be sure I am in compliance with the standard. I need some technical advice from you, and I would like you to tell me how far I have to remove these guys, my crew, to make sure that none of them are hurt by flying debris. What would you tell them, or what would you in a position like that advise him?

THE WITNESS: I am not really in a position, but the State has a ruling of 500 feet, and we have accepted that for a long time.

Q. The State has what?

THE WITNESS: They have a rule in effect approximately 500 feet. They have issued that situation, and I think -- I don't know how -- like I said, I'm not a state inspector.

MSHA Inspector Lyle F. Bixler, confirmed that he was at the mine on July 31, 1981, to assist in the accident investigation. He stated that he has underground blasting experience, and he indicated that a sketch labeled "Don exhibit 4" fairly depicts the area he observed on July 31, except for the presence of a crusher near the stock pile. He indicated that the distance from the blast to where the victim was sitting was 223 feet, and that the distance from the blast to where the blaster was located was 300 feet (Tr. 204-208).

Mr. Bixler confirmed that he issued a citation to the Austin Powder Company, exhibit G-2, and he did so because of MSHA's policy to serve both the contractor and mine operator when their personnel are involved. He believed that Doan Coal Company depended on Austin Powder to provide a service safely. Austin Powder had a continuing presence at the mine because "they would be there pretty much of the time" on six or seven blasting jobs for Doan Coal (Tr. 212).

Mr. Bixler confirmed that he issued the citation to Austin Powder because the blasting crew was not out of the blasting area, and he detected this fact "because of the flyrock and debris that fell around the blast area". He also stated that he did not know whether it was unusual for a blaster to be within 300 feet of a shot area, and he "guessed" that the size of the explosive shot and the terrain would have a bearing on this question (Tr. 214). He believed that the citation was very serious in that more people could have been killed or injured, and he also believed the citation was "significant and substantial" because it was likely that serious injuries could have occurred because of the flying debris and rock that fell around the blaster (Tr. 216).

Mr. Bixler stated that he considered Mr. Lucas to be an employee of Austin Powder, and he believed that Austin Powder was negligent for not removing the blaster and his crew from the blasting area. He confirmed that he filled out an "inspector's statement", and that he indicated that he stated that Austin Powder, as the "operator", was responsible for the blasting and for clearing the area. As the employer of the blaster, he considered that Austin Powder was responsible for the blaster's actions. He also believed that three or four people were exposed to a hazard, namely, the blasting crew, the blaster himself, and the people in the scale house (Tr. 219-221).

Mr. Bixler also confirmed that he issued a second citation to Austin Powder on August 6, 1981, for a separate violation of section 77.1303(h), namely, that portion that requires an ample warning to be given before any blast (Tr. 222). He made the determination that no ample warning was given on the basis of statements made by persons during his investigation.

that he motioned the accident victim that a shot was going to be but that he (Bixler) did not follow up and ask Mr. Bloom what he by his motions to the victim (Tr. 224). Mr. Bixler also concluded since the victim was only 223 feet from the blasting location, "he wasn't warned" (Tr. 225). Mr. Bixler believed that the blaster was in not following the posted warning sign (Tr. 228).

On cross-examination, Mr. Bixler confirmed that most of the made in MSHA's accident investigation report were made by Inspector and that he (Bixler) assisted in the making of the measurements in the report (Tr. 228). Mr. Bixler conceded that at the time he made the citation to Austin Powder, he did not take into account Mr. Lucas' assertion that he believed 300 feet to be a safe distance from the blast. Mr. Bixler also stated that he could not recall discussing this with Mr. Lucas, and that he did not take into account any geological or atmospheric conditions which may have been considered by Mr. Lucas to the blast (Tr. 231). Mr. Bixler also conceded that Mr. Lucas may have the safety of his crew in mind prior to the blast, but probably did not anticipate the actual force of the blast (Tr. 234).

In response to further cross-examination, Mr. Bixler confirmed that he is not a blaster and has never held a blaster's license. He also indicated that he has never done any surface blasting, is not a blasting expert, and that in the event he has need for information on blasting techniques or procedures he would have to consult a blasting expert (Tr. 236). In this case, he indicated that he spoke with Austin Powder's licensed blasting technical representative Ray Thrush but he was not aware of the fact that Mr. Thrush holds a certification from MSHA qualifying him to train other blasters. He could not recall Mr. Thrush telling him that Mr. Lucas acted in a normal and prudent manner at the time of the blast in question, nor could he recall Mr. Thrush advising him that the particular flyrock shot in that direction could not have been anticipated (Tr. 237).

Mr. Bixler identified a copy of his "Inspector's statement" which he filled out on July 31, 1981, with respect to citation no. 104 (exhibit AP-8). He confirmed that he marked the first block under the heading "negligence" to show that the condition or practice "could not have been known or predicted, or occurred due to circumstances beyond the operator's control". He also confirmed that he explained under the "remarks" column of the form where he indicated that the blaster notified all persons of the impending blast about 10 minutes

31, 1981, it was returned to him by his supervisor who advised the form had been returned by someone in the "Washington Solicitor's" who advised his supervisor that he (Bixler) could not conclude Austin Powder was not negligent (Tr. 242). Mr. Bixler did not know the identity of the solicitor, and on the basis of instructions received from his own supervisor, Mr. Bixler prepared another form stating that Austin Powder was negligent (exhibit ALJ-1), and that form was resubmitted on October 16, 1981. He reached his "new" opinion that Austin Powder had cleared everyone from the area on the basis of his observations that the flyrock went after the occurrence (Tr. 243; 257-261).

Mr. Bixler stated that he did not have the technical background or the ability to question Mr. Lucas' judgment that he believed he was at a safe distance prior to the blast (Tr. 244). Mr. Bixler believed that the area at the blast area was a "safe area" if men were under or in the area (Tr. 244). He also believed that the blaster "should be at least close to it that in the event he needs to get under it, he could" (Tr. 244). In this instant case, he believed that Mr. Lucas "should have been closer to the drilling rig", and did not think that he could have gotten under the rig at a distance of 25 or 30 feet. Mr. Bixler also stated that Mr. Lucas thought he was at a safe distance, and when asked what advice he would give someone who may ask him how far back from a blast would be "safe", he said "on the side of safety; and, from what we found out here, I would say at least 500 feet. That's a rough guideline" (Tr. 245-246). Mr. Bixler also stated as follows (Tr. 246):

Q. You would say that in very instance blasters should be at least 500 feet?

A. Not necessarily, no.

Q. It could vary depending upon a number of factors?

A. Sometimes 500 feet, it wouldn't be enough.

Q. Other times it would be more than enough?

A. That's right.

Q. And you really do not have the technical expertise or background to give advice to someone on whether he would be in violation of the law or whether he would be safe at a certain distance?

circumstances.

A. Under normal conditions, yes, but under extreme conditions, no.

With regard to his conclusions that an adequate blast warning was not given to employees in this case, Mr. Bixler testified as follows (Tr. 247-250):

Q. The purpose of this statute is to make sure that those employees who were in the area would be given a sufficient opportunity to go to a safe place; isn't that correct?

A. That's correct.

Q. And any warning device which is understood by the blaster and the other employees and which provides that type of notice would be adequate under the statute, would it not?

A. Would you repeat that again, please?

Q. Any warning, technique or procedure which is understood by the blaster and by the employees on the premises and which gives the employees that notice so that they can go to a safe area would be sufficient under the statute, would it not?

A. In this case, it was posted, and I would think that the signal given could be misleading.

Q. But do you know whether or not Mr. Alvatrona relied upon the sign?

A. That I couldn't say.

Q. You have no way of knowing that one way or the other?

A. No.

Q. You have no way of knowing what Mr. Alvatrona understood by the motion from Mr. Bloom?

A. I have no way of knowing that either.

A. Mr. Bloom stated that he motioned Mr. Alvatrona to shut down.

Q. You were satisfied at that point that those employees at Doan understood that motion to mean he was supposed to shut down because the blast was going to take place?

A. Yes.

Q. That is why you did not feel it necessary to ask Mr. Bloom any further questions about the motion and the meaning of the motion?

A. That's right.

Q. And any warning device or procedure or technique which furnishes an employee with the information the blast is about to take place and sufficient time to find a safe haven does satisfy the statutes, does it not?

A. I would say so, yes.

Q. And certainly direct personal knowledge to an employee given to him either over the radio or in person would be sufficient notice?

A. Probably would be, yes.

Q. You do not have any factual basis for any opinion on whether Mr. Alvatrona would be alive today under any different hypothetical circumstances with regard to notice of hypothetical conduct on the part of anyone else who was on that property, do you?

A. Would you repeat that, please.

Q. Surely. Do you have any factual basis for drawing any conclusion as to whether Mr. Alvatrona would be alive today based on any hypothetical actions or conduct by anyone else who was on the Doan Coal Company property on that day in July of 1981?

A. That I wouldn't know.

Q. It is complete speculation?

stated that ten minutes before the blast Mr. Bloom was in the company radio installed in his loader. He was called by the operator, and told to shut the equipment down. Since the crusher radio he motioned and signaled Mr. Alvatrona to shut the crusher. The hand signal he used is a standard procedure which everyone He had used them before and he believed Mr. Alvatrona understood and he shut the crusher down. After he shut down, Mr. Bloom observed Mr. Alvatrona heading in the direction of the scale house, and that he habitually spent most of his time there (Tr. 272-279).

Mr. Bloom stated that it was company policy to warn employees of impending blasts personally or over the radio. He confirmed that he sounded three airhorn blasts immediately before the blast on the day in question, but it was his view that such warning sounds cannot be heard over the noise of back-up alarms and loaders (Tr. 281).

On cross-examination, Mr. Bloom stated that he never saw Mr. Alvatrona or any other employees inside the blast area prior to the blast. He had no idea as to why anyone would walk into a blast area "unless you were told to watch it" (Tr. 284). Mr. Bloom stated that no barrier was in the road coming onto mine property, that he had never seen such a barrier in the past, and he did not believe it possible that Mr. Alvatrona was serving as a guard the day of the blast (Tr. 286). He confirmed that five to seven minutes, and at most 10 minutes, elapsed between the time he received the radio information about the blast and the actual blast (Tr. 286). He confirmed that the "blow out" surprised him because it was more fly rock than usual. He had no contact with the blast area prior to the shot, and when he saw Mr. Martz driving into the area he signaled him and told him to shut his truck down by means of a hand signal. This was before the warning signals were sounded (Tr. 288).

In response to further questions, Mr. Bloom stated that he was inside his loader where it was parked and that he did not consider himself to be in danger. Since he saw Mr. Alvatrona heading for the scale house, he assumed that is where he was going and did not speak to him (Tr. 291). He believed he was safe, and if he observed fly rock coming over him after the blast, he would not stay in the same location. The next time a blast was fired (Tr. 293). Other similar shots had been fired the same day of the accident (Tr. 294). He had never known Mr. Alvatrona to go and observe shots in the past, and he did not know what he was doing the day he was killed since "after he got past a certain point I couldn't see him" (Tr. 296).



Alvin Mitchell, testified that he is an engineer and safety director for Doan Coal Company, and was so employed at the time of the accident. He confirmed that the company has a qualified training program, that he is in charge of it and is certified to conduct training, and that he trained Mr. Alvatrona. He identified exhibit R-1 as a copy of Mr. Alvatrona's training certificate, and indicated that he was trained in hazards identification as well as in the use and danger of explosives (Tr. 312). Mitchell testified as to the company's blasting signal policy and procedure, and confirmed that there are 33 mobile radio units at the mine on most of the equipment. He also confirmed that he was present during the accident investigation, and stated that the distance from the stock pile area to where Mr. Alvatrona's body was found was 260 feet, and he indicated the normal route he would have taken to get to the scale house from the stock pile area.

Mr. Mitchell confirmed that the location of the blast where the bodies were at was at the edge of the pit and that Mr. Alvatrona would have no reason to be in the area where he was found (Tr. 319). Mr. Mitchell testified that part of Mr. Alvatrona's training included procedures concerning shutting down of equipment and blasting signals (Tr. 322). Mr. Mitchell also indicated that the procedure followed by Mr. Bloom in notifying Mr. Alvatrona about the blast, as well as the mine procedure for notifying other employees was normal and no different from any other day (Tr. 323). Mitchell identified several photographs depicting the spoil pile area where it is believed Mr. Alvatrona was sitting at the time of the blast, and the general scale house area (Tr. 323-328; exhibits AP-1 through AP-10).

Mr. Mitchell testified that he was at the blast scene after the accident, and in his opinion had Mr. Lucas been looking in the direction of the spoil pile he could have seen Mr. Alvatrona (Tr. 333). Mr. Mitchell identified exhibit G-7(k) as a photograph of a typical blasting signal sign posted at the entrance to the mine property, but could not say whether that particular sign was posted on the day of the blast. However, he indicated that a similar sign was posted, and that the men are instructed to listen for the signals depicted on the sign (Tr. 334). He did not state whether the mine road is normally barricaded because he is not at the mine when blasting takes place (Tr. 335). Mr. Mitchell stated further that the spoil pile was 13 to 14 feet high, and that Mr. Alvatrona's truck would not require his presence there (Tr. 338).

Mr. Mitchell considered the scale house, the drill truck, and the crusher to be suitable blasting shelters (Tr. 343). Mr. Mitchell conceded that Mr. Lucas may not have followed the literal blasting

pounds of explosives that he would have ordered men to be removed 300 feet since there was a chance that flyrock would reach that distance. However, the blaster was 300 feet away and he believed this was (Tr. 362).

David G. Doan, testified that he is the managing owner of Doan Company and that he has been in the coal business since 1944. Mr. Doan stated that all mine equipment except for bulldozers are equipped with radios and that everyone on the site is given actual notice, either personally or by radio, before a blast is fired. Everyone on the site is notified to shut down and await the shot regardless of how far away from the actual blast they are located. Mr. Doan confirmed that he is experienced in the use of explosives, and as far as he is concerned, the use of air horns is not effective because of the roar of the equipment and that is why mine procedure calls for the shut down of all equipment before a blast and personal notification given to all employees (Tr. 371).

Mr. Doan stated that the scale house was a secure area and "there is no way that a rock could go through the scale house". He also indicated that the crusher is made of structural steel and that it make "a wonderful shelter" (Tr. 372), and that since he has been in the coal business he has never had any problems with notifying employees when clearing out blast areas. He confirmed that the accident in question was his first fatality, and that there have never been any explosion related injuries at the site since he has been in business (Tr. 373). With regard to the signals given and the definition of "blast area", Mr. Doan testified as follows (Tr. 376-377):

Q. Mr. Doan, you mentioned that the victim was personally told that there was going to be a blast.

A. Well, he was personally notified with the signals.

Q. There is a distinction between personally told and personally signaled; would you not agree?

A. Well, that depends on how fine a little thin line you want to draw. He personally understood the signals because he had been taking them and giving them up until then. It was nothing new that he got. The signals that he got that day were the same as he always got.

Q. Do you mean he never got them before on the radio?

In Powder Company's Testimony

Jeffrey A. Lucas confirmed that he is a licensed blaster and holds a college B.S. degree in mathematics. He stated that the warning signals before and during the blast in question consisted of radio contacts to fifteen minutes before the blast and three signals immediately prior to the blast, and no one ever requested that this be changed. To his knowledge he has never known of any Doan employee to ignore the signals. He had no reason to believe that anyone did not understand them. He believed he was in a safe location on the day of the incident, that the shot was laid out to go away from where he and the crew were located, that he had previously made five to six previous shots at that location (Tr. 400, 412). There were no blowouts from the previous shots, and had one in question gone the same as the others no one would have been in danger 100 feet from the shot. There was nothing unusual about the size of the shot in question, and in relation to the others they were all the same, including the amount of explosive used (Tr. 402).

Mr. Lucas stated that he believed his crew was in a safe location. He also believed that the scale house was safe because it was further away from him and away from the shot location. He confirmed that he was looking at the blast area and he indicated that he prefers not to be under a truck because he wants to view the blast and can always move away from any danger. On the day in question, he never expected the flyrock to come as far as it did and he was not aware that anyone was on the spoil bank. He saw no one in the area that he considered to be the blast area (Tr. 403). After the incident, MSHA suggested to him that he move further back, seek some sort of protection, and suggested a 500 foot distance as a guideline. He personally would not like to be 500 feet from a shot and would prefer to be somewhere where he can see it (Tr. 409).

Mr. Lucas testified that from where he was standing at the time the shot was set off he was unable to see the crusher because it was behind a coal stock pile and there was a line of trees in the area. He personally

houses to be identified on the form (Tr. 441-446).

Mr. Lucas explained the characteristics of a "blowout", and confirmed that he checked all of the holes for potential signs of an incident. He explained the wiring and detonation of the shot, confirmed that since the accident he has changed his signaling procedure to comply with the blast warning sign which is on the property, and the radio signal system is also being used (Tr. 441-446).

Ray Thrush, testified that he has been employed with Austin Powder for approximately eleven years as a sales and technical representative. He confirmed that he has been a licensed blaster since 1967 and is licensed in the States of Pennsylvania, Maryland, and West Virginia. He also indicated that he is an MSHA certified surface and underground blaster instructor. Mr. Thrush confirmed that he has been going to Doan property since 1971, and prior to his employment with Austin Powder was on the site doing blasting work with the National Powder Company. He also indicated that prior to July 30, 1981, and before radios were obtained, the warning signals which were used were "personal contact" and "all machinery". Since that time radio contact is used, and the use of blasts on an air horn was also used as a signal within the past several years and before July 30, 1981 (Tr. 454-458).

Mr. Thrush confirmed that he was at the mine the day after the blast during the investigation and was familiar with where Mr. Lucas was positioned at the time of the blast. In his opinion, Mr. Lucas was at a safe distance, and he indicated that based on the number of holes and the amount of the powder used, he could have been 100 feet close to the blast and still been safe. Mr. Thrush described the 24 charged holes as a "one", and he also indicated that as a blaster, he would like to be so that he can observe a shot. He also indicated that during his interview with Inspector Bixler, Mr. Bixler indicated to him that he could not see anything wrong with what Mr. Lucas had done (Tr. 458-462).

Mr. Thrush indicated that he was present when MSHA Inspector Zangary terminated the citation and he indicated that he did so by coming to the mine to observe the manner in which another shot was fired. The inspector was in front of the spoil pile and the crew and the inspector were behind the equipment trailer when the blast was fired. Inspector Zangary indicated that this was sufficient coverage. However, the shot could not be seen and after the blast two boys on trailbikes came out of the nearby area and Mr. Thrush stated that when he asked Mr. Zangary how he would handle the event if the boys had ventured into the shot area and been killed, Mr. Zangary replied that it would have an "accident" (Tr. 464).

200 feet from the east site, and that would be the area he would have been concerned about keeping secured (Tr. 471). Mr. Thrush confirmed that he has had some 30 years experience working in coal mines and gas fields "shooting gas and oil wells and stripping" (Tr. 472).

### The Jurisdictional Question

Apart from any factual disputes concerning the alleged violations, there is no jurisdictional dispute between MSHA and the respondent Doan Coal Company. Doan Coal is a Pennsylvania strip mine operator and it concedes that its mining operations are subject to the Act and to MSHA's enforcement jurisdiction. The jurisdictional dispute in this case is between MSHA and the respondent Austin Powder Company.

### The Nature of Austin Powder's Business

In its posthearing brief, Austin Powder states that it is a manufacturer and supplier of explosives to a number of different industries, including the coal mine industry (Tr. 466, 507). To ensure the safe use of its products and safety of both its customers and the general public, Austin Powder, at no charge, provides technical expertise and advice to those customers who desire such assistance (Tr. 465, 476). As one component of the assistance which is available to the customer, Austin Powder has licensed blasters who may be loaned to a customer upon request, but Austin Powder is not obligated to provide a blaster to a customer, nor is there any guarantee that at any particular time a blaster will be available (Tr. 508). Austin Powder maintains that this situation must be contrasted with that of a contract blaster who enters into a contract with an individual to perform blasting services. In such arrangements the contract blaster is contractually obligated to provide blasting services and is paid for such services. In contrast, there is no obligation whatsoever upon Austin Powder to provide blasting services for customers, and if a blaster is made available no charge is paid for such service (Tr. 465-466).

Austin Powder maintains that in instances where a customer desires to utilize Austin Powder's technical expertise, the parties enter into a service agreement. Under the agreement, Austin Powder agrees to lend the customer the temporary use of Austin Powder's employees and equipment free of charge (Tr. 465, 476). In return, Austin Powder states that the customer agrees that while it is using such employees and equipment the employees are under the sole supervision and control of the customer and that all work and services performed by such individuals are at the sole risk and responsibility of the customer.

Austin Powder states that on January 19, 1981, it entered into a

decided when to blast and had the right to control the details of the blast (Tr. 410-411).

Whether Austin Powder is an "Operator" within the Meaning of the

Austin Powder maintains that before MSHA can assert jurisdiction in this matter it must establish that Austin Powder is an "operator" within the meaning of 30 U.S.C. 802(d). Austin Powder states that this is abundantly clear, and that MSHA has conceded as much, that Austin Powder does not own, lease, operate, control or supervise a coal mine. Although MSHA does allege that Austin Powder was an independent contractor performing blasting services for Doan Coal on the day in question, such was subject to MSHA's jurisdiction, Austin Powder asserts that MSHA's position is wholly untenable because the clear evidence establishes that Austin Powder was not an independent contractor performing blasting

Austin Powder argues that before it can be found to be an independent contractor under the Act, MSHA must establish the existence of a contract between Austin Powder and Doan Coal whereby Austin Powder contracted to provide services for Doan Coal. Austin Powder maintains that MSHA failed to introduce any evidence that such a contract existed. Austin Powder states that MSHA has not even tried to establish the existence of a contract.

Austin Powder maintains that it is not, and was not a contractor, has no drilling capacity, and does not contract blasting services. It is a manufacturer and supplier of explosives to numerous industries including the coal industry, and that it entered into a sales agreement with Doan Coal in which Doan Coal purchased a quantity of explosives. To ensure the safe use of its products, Austin Powder, pursuant to a service agreement voluntarily entered into by the parties, allowed Doan Coal to draw upon its technical expertise to assist in detonating explosives. The agreement is a legally binding, valid document. Austin Powder loaned Doan Coal its employees for Doan Coal's use. New River Crushed Stone v. Austin Powder, 210 S.E.2d 285 (N.C. 1965); Fralin v. American Cyanamid Co., 239 F. Supp. 178 (W.D. Va. 1965); Portland Cement Co. v. DuPont, 118 F. Supp. 603 (D. Ore. 1953); Powder Co. v. Campbell & Sons Co., 144 Atl. 510 (Md. App. 1929). This was made for this technical expertise (A.P. Exh. No. 11; Tr. 466). Moreover, Austin Powder states that it had no obligation under the agreement to provide such technical service, and if its people were available, Doan Coal could not require that Austin Powder furnish it. In short, Austin Powder maintains that the loaning of its employees to Doan Coal to ensure safe use of its product was a gratuity and not by contract.

as not subject to MSHA's jurisdiction.

Austin Powder argues that on the facts of this case, those individuals who allegedly committed the cited violations were, as a matter of law, Doan Coal Company employees, and not employees of Austin Powder. In support of this argument, Austin Powder argues that the express terms of the service agreement clearly and unambiguously state that while the Blaster Lucas and his crew were on Doan Coal property they were for all intents and purposes Doan Coal employees. Doan Coal had the sole right to supervise and control the activities of Lucas and his crew, and Doan Coal performed all the drilling and decided how many holes to drill, the depth of the holes and the location of the holes (Tr. 410). Doan Coal had the right to supervise the details of the blasters' work and when a question arose the blaster looked to Doan Coal for direction (Tr. 411).

Austin Powder asserts further that Courts have long held that the paramount consideration in determining whether an independent contractor or an employer-employee relationship exists is who has the right to control and supervise the details of the work activity. See e.g. Joint Council of Teamsters No. 42 v. N.L.R.B., 450 F.2d 1322 (D.C. Cir. 1971); Assoc. of Independent Owner-Operators, Inc. v. N.L.R.B., 407 F.2d 1383 (9th Cir. 1969). In this case, given the service agreement's clear language and the actual uncontradicted testimony of the witnesses, Austin Powder concludes that it is clear that Lucas and his crew were, as a matter of law, Doan Coal employees and accordingly, Austin Powder cannot be held subject to MSHA's jurisdiction.

Finally, Austin Powder maintains that MSHA's latest policy memorandum concerning the identification of independent contractors under the Act makes it clear that Austin Powder falls outside the scope of an "operator" as defined by the Act. Under this memorandum, before a company will be considered an independent contractor for the purposes of the Act, it must inter alia, perform both drilling and blasting services, the precise services which a contract blaster provides. Austin Powder notes that it is significant that MSHA chose the conjunctive in this subsection, but in all other subsections where more than one factor was listed chose the disjunctive thereby clearly intending to include the definition of an independent contractor only to those companies which provide both drilling and blasting services. Since it is not a contract blaster, Austin Powder concludes that it falls outside of MSHA's own criteria for determining whether an individual is an independent contractor and is not subject to MSHA's jurisdiction.

the opposite conclusion. Namely, that the blaster, Jeffrey Lucas, was a full time employee of Austin Powder, whose services were paid for by Austin Powder as part of the price from selling explosives to mining companies.

MSHA argues that as a private business, Austin Powder has a right to conduct its business in a manner which it finds the most convenient in accordance with general industry practice, and that MSHA has no objection to "service contracts" per se, between companies providing services to coal mining companies, like Doan Coal. However, MSHA maintains that it should be obvious that the Secretary of Labor and the Federal Mine Safety and Health Review Commission are not bound to accept, on face value, the so called "gratuitous nature" of a service contract, especially if its intended purpose is to limit liability which would otherwise be imposed under the Act. MSHA asserts that to follow Austin Powder's viewpoints with regard to its attempt to award liability in this matter would amount to a total disregard of the Congressional intent expressed in the 1977 Mine Act, of placing liability for violations according to actual conduct.

MSHA maintains that a review of the service contract entered into between Austin Powder and Doan Coal indicates that it has little to do with any actual services performed by Austin Powder, and that it is merely an indemnification agreement which Austin Powder requires its customers to sign prior to allowing them to use its blasting services. MSHA states that the customer is really not given any choice and is required to assume all the risks and responsibilities inherent in an extremely dangerous occupation.

MSHA points to the fact that Jeffrey Lucas, the blaster, testified that he considered himself a full time employee of Austin Powder, was never told anything to the contrary, believed that he was in charge of the blasting area, and acknowledged that it was up to him to make sure that everyone in the blasting zone was notified (Tr. 29). It was his function to check the wiring for the explosives prior to the blast and notify members of his crew when to give the signal that a blast was going to occur, after he checked the pit area visually.

MSHA also points out that Mr. Lucas' presence at the Doan Strip Mine was long term and continuous, and that Mr. Lucas testified that at least 50% of his blasting work was at the Doan Strip Mine and he was generally on the property four to five times a week for up to five hours a day. Also, Mr. Lucas usually brought a crew of men with him to assist them with the blasting operations and proceeded directly to the pit area without waiting for any instructions from the supervisory personnel employed by Doan Coal. Under the circumstances, MSHA submits that



## Findings and Conclusions

### The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee or other person who operates, controls, or supervisors a coal or other mine or any independent contractor performing services or construction at such mine;" (emphasis added).

Section 3(g) defines "miner" as "any individual working in a coal or other mine", and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property \* \* used in, or to be used in \* \* the work of extracting such minerals from their natural deposits \* \* \*".

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. report of the Senate Committee on Human Resources states:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14: Leg. History of the Mine Safety and Health Act, Committee Print at 602 (hereafter cited as Leg. Hist.).

them to come back another time. Doan has also used dynamite, and if Doan had a preference it may determine the direction that it will the blast to go. While Doan may prefer that the blast be directed away from equipment, the direction of the blast would be left to the blaster (Tr. 340-342). Mr. Mitchell stated that during his three and one-half years at the mine Austin Powder conducted 90 percent of the blasting which was done at the mine site (Tr. 353). The only thing he is required to do insofar as Austin Powder's employees are concerned is to insure that they have signed the hazard recognition sheet before they enter the mine site (Tr. 355).

Blaster Jeffrey Lucas confirmed that Doan Coal Company determines the number of blast holes to be drilled, as well as the diameter and depth of the holes. Doan Coal also determines when the holes are to be loaded and then notifies Austin Powder. Should a hole be plugged, Austin Powder will attempt to take care of the problem, but "if there is anything out of the ordinary Doan Coal will tell us how they want things done" (Tr. 356).

Mr. Lucas testified that he considered himself to be an employee of Austin Powder Company and has never considered himself to be employed by Doan Coal (Tr. 416). None of his supervisors have ever advised him the contrary, and he considered the services he was performing at the mine to be an important part of the mining process. He conceded that he was at the Doan site performing a service, but he denied that Doan Coal paid for his services. He explained this by stating that Doan buys powder from Austin and he makes up the billings for the shots and there is no specific charge for his services. He had no knowledge that the charges for his services, which are paid for by Austin, are included in the price that Doan pays for the powder which is used (Tr. 418).

Austin Powder's technical representative Ray Thrush identified exhibit AP-11 as the "service agreement" between Austin Powder and Doan Coal, and he confirmed that he signed it on behalf of Austin Powder, and that it was the only agreement between the two companies. \*/ He denied that Austin Powder is a "contract blaster", and he defined

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\*/ A copy of the "Service Agreement" is included herein as an attachment to this decision, and the document is incorporated herein by reference.

indicated that as part of the selling of the powder, Austin Powder provides its technical experience or advice in detonating the powder which it sells, and the electronic detonating devices are owned by Austin Powder (Tr. 466-468). He also confirmed that the blaster is responsible for the safety of the blast (Tr. 468).

Mr. Thrush could not state how much business Austin Powder did with Doan Coal in 1981, and he had no knowledge as to any prior business volume between the two companies. He indicated that Austin Powder probably has no more than ten blasters working in the State of Pennsylvania, and that customers are not charged for their services. When asked about the cost of trucks and blasting equipment, he answered "the same setup" (Tr. 476). When asked whether these costs are passed on to the customer as part of the purchase price of the dynamite he replied "I guess" and "that is very possible" (Tr. 477).

With regard to the service agreement, Mr. Thrush stated that a new one is executed every year, and that it is not done on a job-by-job basis. The services performed under the agreement are on a continuing basis for a year (Tr. 477). Mr. Thrush indicated that when he worked for the National Powder Company, there were no such service agreements in effect, but he did not know why "because I was not involved" (Tr. 478). Mr. Thrush confirmed that the Austin Powder agreement is signed every year on the advice of the company's counsel (Tr. 479).

Contrary to Mr. Thrush's testimony that his previous employer did not have a "service contract" with its customers, Austin Powder's counsel asserted that "virtually all" of its competitors have such contracts and that "it is an industry practice" (Tr. 512). Counsel also contended that when the blaster, Mr. Lucas, goes to Doan Coal's property to perform his blasting chores under the service agreement he is Doan Coal Company's employee (Tr. 513-514). However, counsel conceded that Austin Powder still pays all of Mr. Lucas' regular benefits, such as health coverage for his family (Tr. 514). With regard to the right of Doan Coal to supervise Mr. Lucas, Austin Powder's counsel took the position that mine operator Doan believed that he may exercise supervision or control over

there looking over his shoulder as to what he is doing. He wires the holes and wires up the shots, is he?

MR. WALL: I am not aware that he commonly does. He could if he wanted to.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you mean that he could supervise Mr. Lucas in the manner he wires up and loads the shots and puts them off?

MR. WALL: He certainly could.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why doesn't Mr. Doan do the blasting himself? He could save a little bit of money.

MR. WALL: Mr. Doan does not want to do the blasting anymore. He has other things to do. He started out with a small operation. Now he has some ten pits. He has a larger operation and has other people doing lots of things that he used to do himself.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Wall, if you have any information with regard to the activities of Austin Powder, is it a common arrangement in strip mining in this area to have the manufacturer of the explosives do the actual blasting for the mine operator?

MR. WALL: It is not at all unusual, no. I cannot say that it is the normal practice in every instance. But I am not familiar with the practices here. But I know that most of the larger manufacturers also have similar arrangements.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Again, I am not familiar with the light of this service agreement. In the section where it says Austin Powder Company is not engaged in blasting work. How can one say that Austin Powder is not engaged in blasting work when, in fact, they set the wheels in motion? They dispatch three people when the call comes. Three people, vehicles, equipment and the product comes. They charge the holes, the blast goes off. Now, you say that is not blasting? Is that blasting work, setting the charge and blasting?

ADMINISTRATIVE LAW JUDGE KOUTRAS: Under this service agreement the blasting work is performed by Doan not Austin Powder?

MR. WALL: That is correct. It is an arrangement which is made in our industry as well. It is not uncommon for example, for heavy equipment with its operator to be loaned to another employer. A crane, for example, could be loaned to some particular employer with its operator for use during a particular period of time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Yes, but usually in those kinds of arrangements they pay for them, do they not? In this case had MSHA opted not to cite Austin Powder as a respondent in this case and decided only to go against Doan Coal Company and issued the citations only to Doan and sought the maximum civil penalties in this case on the theory that Mr. Lucas as an employee of Doan Coal Company was negligent and, therefore, that negligence is imputed to his employer Doan Coal Company. How do you think Mr. Hanak sitting next to you would be arguing in that case?

MR. WALL: I cannot speak to that.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Hanak, does your client realize that this service agreement, when those people and equipment come in the Government would consider those people to be his employees from now on?

MR. HANAK: We have never thought of the impact as far as any criminal action like here.

During the course of the hearing, Austin Powder's counsel indicated the company sells explosives "in about 37 states" (Tr. 507). He indicated that in terms of sales volume, Austin Powder ranks second in terms of national sales volume, but emphasized the fact that they are only "a handful of explosives manufacturers" (Tr. 507).

During the hearing, Doan Coal's counsel took the position that in the event that it is decided that Austin Powder is not subject to MSHA's jurisdiction and are found not to be liable because of the service agreement, this would serve as a basis for immediately imputing to Austin Powder's liability to Doan Coal simply because of the agreement (Tr. 479). Austin Powder's response was that "Austin is not within the

utilize experts in the field of drilling or blasting (H. 309) summarizing his position concerning the blaster's "independent status in this case, Austin Powder's counsel argued as follows

MR. WALL: There are two reasons. One is that under the service agreement it is the intention of the parties that Mr. Lucas and others be loan servants in essence of Doan Coal. Loan servants is a well established common law concept. It has been accepted in the industry in every state. The normal detriment of the status of a particular individual is the intention of the party at the time. That intention is clearly explained here in the document. The intention of the parties is that Mr. Lucas be, for lawful purposes, freed as an employee of Doan Coal Company at the time so that Austin Powder as a corporate entity would not have liability.

Mr. Lucas while at Doan Coal Company is under the control of Doan Coal Company. When Mr. Lucas is at a mine operator's property Austin Powder does not have control over those operations. It does not have insurance for those operations. It does not anticipate having liability for those operations and seeks to be protected from that liability. It is willing to furnish that service to a customer in exchange for the customer's agreement to be responsible for any of the actions and to be responsible for that employee while he is on the property.

The second factor is that there are very few guidelines in the statute for the regulation for what constitutes a mine operator. One goes back to the history of the 1977 Amendment of the Bituminous Coal Association's arguments. Because they were upset with construction companies who were coming on to their property and committing violations for which the mine operators were held responsible. It looks at the limited guideline that is available and that limited guideline is in the regulation. The regulatory definition of an operator there is that there is a requirement that there be a contract for services.

In this instance there is no such contract where Austin Powder is contractually bound to provide any services. Hence, within the strict technical means of

there is a charge for those people and they come in on a contract basis and are paid for this. This is not an arrangement of that type.

I take note of the fact that MSHA considered Austin Powder as an "independent contractor" subject to the Act, and in fact assigned Austin Powder a contractor Identification Number. While the assignment of such identification number does not ipso facto bestow "contractor" status on a company, I find nothing in the record to suggest that Austin Powder has protested MSHA's characterization of its activities in this regard. MSHA's Independent Contractor regulations found in Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines "independent contractor" as follows at section 45.2(c):

"Independent Contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; \* \* \*

Although Part 41, of the regulations dealing with the application of the requirements of section 109(d) of the Act that mine operators submit certain "legal identity" information to MSHA does not apparently apply to "independent contractors", Part 45 does. Further, other regulatory requirements such as those found in Parts 48 and 50, Title 30, Code of Federal Regulations, require contractors to comply with certain training and recordkeeping requirements of the law. As a matter of fact, in this case Austin Powder's technical representative Ray Thrush is an MSHA certified blasting instructor, and the blaster Lucas testified that he personally performed blasting at Doan's mine. This being the case, I find that Mr. Lucas is "MSHA certified" to perform the duties required of a blaster's under Part 77, Title 30, Code of Federal Regulations, and that Thrush also has MSHA's stamp of approval to train blaster's in accordance with MSHA's requirements.

In addition to the foregoing, I take note of the fact that in response to an order directing MSHA to submit any evidence concerning Austin Powder's history of prior violations, MSHA submitted a copy of a Decision and Order of the Mine Safety and Health Review Board dated November 26, 1980, approving a settlement between Austin Powder and MSHA providing for the payment of \$20,000, for five years served on Austin Powder in 1979 for five violations of several safety blasting standards found in Part 56, Title 30, Code of Federal Regulations. Although a copy of the "compromise settlement agreement" submitted by Austin Powder's counsel Wall and MSHA's counsel contains a

Although the aforesaid "settlement agreement" also contains a statement that it is the "intent of the parties" that the settlement approved by Judge Kennedy shall not be "offered, disclosed, admitted in evidence" in future litigation involving the parties for the limited purpose of showing prior history by Austin Powder, Austin is not bound by the parties intent in that case. It seems to me that the payment of \$20,000, by a company who vigorously disclaims liability by the Act is somewhat contradictory. If Austin Powder is bound to the Act as a mine operator or independent contractor, then the use of prior history is totally irrelevant. Further, in at least one case concerning the approval by a judge of a settlement entered into by the parties, the Commission has not recognized the use of "disclaimer" or "exculpatory language" in its review of approval or disapproval of settlements in such settlement negotiations when it appears that the use of such language is for the purpose of insulating an operator from enforcement jurisdiction. See: MSHA v. Amax Lead Company, 2 FMSHRC 975 (1982). See also, Co-Op Mining Company, 2 FMSHRC 1000 (1980), where the Commission rejected a Judge's approval of a settlement when it appeared that no violation of any mandatory standard

In my view, Austin Powder is more than a mere sales company for blasting powder and explosives used in the removal of overburden by mine operators for the express purpose of mining the coal vein located immediately below of the surface. Austin Powder is directly involved in the coal removal process when it provides the blaster, equipment, and trained personnel to do the actual blasting and removal of overburden. Under these circumstances, Austin Powder is an independent contractor within the reach and jurisdiction of the 1977 Mine Act. Austin Powder is different from other independent contractors who are retained by mine companies for the express purpose of utilizing their experience in different phases of the coal extraction process. A mine operator may retain the services of a contractor to perform certain excavation work, or to construct other necessary facilities such as cleaning facilities, tipples, or even bathhouses, or to perform certain drilling and excavation work. As a matter of law, these contractors are independent contractors under the Mine Act's definition. On the facts of the instant case, the citations issued to Austin Powder described conditions existing at the mine by an employee of Austin Powder relating to the work that Austin Powder was engaged to perform. As a matter of fact, Austin Powder was involved in the abatement of the citations attributed to it. Austin Powder's violations.

Norwithstanding Mr. Thrush's "loss of memory" concerning the cost of who absorbs the costs of the services provided by the b



if Austin gave its powder away I would still conclude that it was engaged in provided a blasting service, albeit gratuitously.

It seems clear to me from the record in this case, that contrary to any intent on the part of the parties as to the status of the blaster Lucas, he is in fact an employee of the Austin Powder Company. It is also clear to me that on the day of the accident in question Mr. Lucas was performing an important service at the Doan Mine site and that this service was directly related to the extraction of coal. While it may be true that anyone on Doan's mine property is subject to the "control" of the mine owner and operator, this is no different from the "control" that any land owner of businessman exercises over persons who come onto his property or enter his business establishment. The critical question here is whether Doan Coal exercises supervision and control over Austin Powder's blaster while the blaster is performing his blasting duties.

I conclude and find that while engaged in the work of the actual blasting and removal of the overburden on the day of the accident, the blaster, Mr. Lucas, was performing his duties as a "miner" as defined in section 3(g) of the Act, that he was not under the control of Doan Coal Company while performing these duties, but rather, acted as an employee and agent of the Austin Powder Company. In addition, I also find and conclude that as the licensed blaster Mr. Lucas acted independently from any direct supervision or control by Doan Coal Company, and that in his capacity as the licensed blaster he exercised direct supervision and control over his crew, all of whom are in the employ of Austin Powder and that he also had direct control of the trucks and equipment owned by Austin Powder and used in the blasting process. Further, Mr. Lucas had full responsibility for the blast, including the charging of the holes, and the final detonation. He was also responsible for insuring the safety of his crew and other miners, and he issued the order to shut down all mine equipment immediately preceding the blast. As a matter of fact, Doan's own safety director Mitchell testified that once the blasting crew comes onto mine property, the only contact he has with them is to make sure that they have signed a "hazard recognition" form.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, including the arguments advanced by the parties in support of their respective positions, I conclude and find that for the purposes of this proceeding Austin Powder Company is an independent contractor who was performing blasting services at the mine site in question on the day of the accident and as such is, as a matter of law and fact an "operator" within the meaning of the Act and is therefore subject to the Act as well as to MSHA's enforcement jurisdiction. I reject Austin Powder's "common law loan

that Austin Powder did in fact provide rather extensive and continued services for Doan Coal Company, and that the services provided were directly related to the mining of coal. Austin's attempts to limit liability through the use of a "service agreement" may be recognized as valid as between the parties, but I reject it as a means of absolving Austin from any responsibility or accountability under the Mine Act. I accept MSHA's arguments that acceptance of Austin Powder's attempt to limit its liability by means of the "service contract" would amount to a total disregard of the Congressional intent expressed in the Act of placing liability for violations according to actual conduct, and that such a result would be contrary to public policy.

Fact of Violation - Citation No. 1041345, August 6, 1981, 30 CFR

Citation No. 1041345 was issued because the inspector believed Mr. Lucas failed to give "a proper warning according to the post requirements", and that his asserted failure to do so constituted a violation of section 77.1303(h). The first sentence of this standard states "Ample warning shall be given before blasts are fired".

The requirement stated in section 77.1303(h) is that an ample warning be given before a shot is fired. MSHA's position in this case appears to be that by failing to follow the blasting warning signal system which was posted on a sign on the road coming onto the mine site, Mr. Lucas failed to give the kind of warning required by the standard. In this case, MSHA contends that the signal system posted on the sign was required to be followed by Mr. Lucas, and when he failed to follow it he violated section 77.1303(h). A short answer to this argument is that the standard itself does not provide for any specific signals to be given. It is up to me that since blasting and the use of explosives is inherently dangerous, MSHA should as a minimum promulgate a standard that makes it absolutely clear as to what is required. The use of such broad language as "warnings" leaves much to the imagination, and the instant case is an example of this. MSHA's counsel conceded during the hearing that the cited regulation does not require the use of any particular sign or the posting of signs, barricades, or road guards for the purpose of warning persons about blasting.

MSHA's counsel conceded that there is no specific regulatory definition as to what constitutes a "proper" or "ample" warning signal prior to the detonation of any shot (Tr. 42). His position is that if a sign gives sufficient warning of a pending blast and gives the mine operator and contractor's employees time to remove themselves from a blast area, that sign is followed, then ample warning is given (Tr. 43). Given

that the question as to what constitutes an "ample warning" within the meaning of the standard "has to be determined by the facts" (Tr. 78). Further, since the standard itself does not require any particular form of warning such as signs, flags, barricades, or the sounding of horns, MSHA's arguments that the blaster was required to follow the signal system posted on a sign which was located on a mine road leading onto the property is rejected.

MSHA's counsel conceded that there is no requirement for the use of blast warning signs, and there is no requirement that such a sign be posted on the mine roadway (Tr. 451-452). As a matter of fact, the sign was on Doan's property and which has been referred to in this case was in fact a sign approved or furnished by the Office of Surface Mining (U.S. Department of the Interior (Tr. 450). However, counsel took the position that if the sign is posted, it becomes the blast warning plan and the operator should follow it (Tr. 452). Absent any showing that the mine operator or contractor in this case were required by any MSHA standard to adopt a signal system and post it on such a sign, I cannot conclude that Mr. Lucas' failure to do so ipso facto constitutes a violation of the warning requirements of the cited regulation. MSHA has conceded as much when it agreed that the question of what constitutes an "ample warning" has to be determined by the facts of any given case. Further, I believe that the question as to whether any blasting warnings are "proper", as charged in the citation in question, is a highly subjective matter which is not even addressed by the regulatory language in question. What may be "proper" to an experienced and licensed blaster who is at the blast site supervising a shot, may not be "proper" in the judgment of an inspector who is called upon (in hindsight) to render a judgment after an accident such as the one which occurred in this case.

In a case decided by Judge Broderick on October 13, 1981, MSHA v. Domett Industries, Inc., 3 FMSHRC 2345 (1981), a salt mine operator was charged with a violation of section 57.6-175, an underground blasting regulation, the first sentence of which is identical to the first sentence of section 77.1303(h). In that case two miners were killed in a blasting accident, and MSHA charged that the blasting crews had failed "to use effective voice communications between themselves to provide ample warning when firing blasts". Although Judge Broderick ruled that since two miners were killed it was obvious that they were not warned, he also observed that oral communication is not the only way to provide "ample warning" in compliance with the standard, and he rejected MSHA's suggestions to the contrary.

proceedings presented credible evidence that Mr. Lucas did all that could reasonably be expected of him on the day in question to insure that miners were apprised of the fact that there would be a shot or blast, and my reasons for these findings follow.

Mr. Lucas' unrebutted testimony is that five-to-ten minutes between the time the shot was fired and actually detonated. During that time a call was placed over the mine radio communications system to the personnel in the scale house, as well as the mine office, that the blast would be set off and that all equipment should be shut down. In addition, prior to the actual detonation, three 20 second blasts on the air horn were sounded, and a siren signal was sounded for at least one minute prior to the blast.

David Potempa testified that when he arrived on mine property five minutes before the blast, he knew there was going to be a blast because he had seen the blasting crew earlier in the day, and he went directly to the scale house. He also testified that he knew the blast would be fired because he heard the warning signals go off five minutes before the blast and one minute before it was actually detonated. Mr. Potempa believed that he received adequate warning, did not feel that he was in danger, and believed that the signals sounded on the day in question were the same as those posted on the signal sign by the mine roadway.

Crusher operator Albert Bloom testified that ten minutes before the blast he received notice over the company radio installed in his truck and he received the notice from the dragline operator who instructed him to shut the equipment down. Since the crusher where the accident occurred, Mr. Alvatrona was working had no radio on it Mr. Bloom signaled him by hand to shut the crusher down, and Mr. Alvatrona complied. Mr. Bloom testified that the hand signal which he gave to Mr. Alvatrona to shut down the crusher was one that is regularly used and it is a procedure that everyone on the mine followed. As a matter of fact, he indicated that when he observed the truck driver Martz driving into the area he signaled him to stop and to shut it down. Once the loader and crusher were shut down, Mr. Bloom observed Mr. Alvatrona heading toward the scale house and he assumed that he was going there and did not speak to him further. Mr. Bloom also confirmed that company policy calls for personally advising employees of an impending blast over the radio communication system at least five to seven or ten minutes elapsed between the time he received the radio notice and the actual blast. He also confirmed that it is normal operating procedure to shut down all equipment as soon as notice of a blast is received, and if any of his fellow workers do have

With the direct personal contact made over the mine radio communications system was an ample warning within the meaning of the sentence of section 77.1303(h). Accordingly, respondent Austin Company was in compliance with the cited standard and the section citation No. 1041345 IS VACATED.

Violation - Citation No. 1041342, July 31, 1981, 30 CFR 77.1303(h)

Citation No. 1041342 contains two "specifications" which the inspector believed constituted violations of the second sentence of safety standard section 77.1303(h). The citation asserts that persons were not cleared and removed from the blasting area", that "suitable blasting shelters were not provided to protect men endangered by concussion or flyrock from blasting". The pertinent portion of section 77.1303(h), is as follows:

All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting.

Alleged failure to clear persons from the "blasting area"

The term "blasting area" is defined by section 77.2(f) as "the area in which blasting operations in which concussion or flying material can reasonably be expected to cause injury". MSHA's theory in this case seems to be that since someone was killed, the victim was obviously not removed from the blasting area. In the circumstances, MSHA argues that since the standard deals with explosives and blasting, an operator is absolutely liable for any resulting injuries or deaths. MSHA's theory of absolute liability was expounded on by its counsel during the course of testimony from the bench (Tr. 177-182). MSHA's counsel takes the position that since the standard deals with explosives there is absolute liability when the operator fails to remove all persons from the blasting area even though the operator may have made a reasonable physical search of the area prior to blasting. MSHA's position is highlighted by its posing the following question asked by me during the course of the hearing (Tr. 181):

ADMINISTRATIVE LAW JUDGE KOUTRAS: If some back packer came on the site, crawled in his sleeping bag and fell asleep; and, during the hoot owl shift, a shot fired off, the mine operator took reasonable steps to remove and to account for all of his people, and every man was taken

but you are dealing with explosives, and we do think that  
is an absolute liability to remove all persons.

In the Domtar Industries case, supra, MSHA amended the citation after the action before Judge Broderick was begun to include an area that the two men who were killed were not cleared and removed from endangered by the blast as required by the second sentence of section 57.6-175. This standard uses the phrase "areas endangered by the blast" rather than "blasting area". In affirming the violation, Judge Broderick ruled that "the fact that the miners' bodies were found in that area is an irrefutable proof" that all persons were not cleared from the area endangered by the blast. In a footnote to this ruling, Judge Broderick stated as follows at 3 FMSHRC 2348:

The Mine Act is generally a strict liability statute. The language of the cited standard and the wording of § 110(a) of the Act make it plain that unforeseeability is not a defense to a violation, nor can the operator avoid a violation by placing the blame on a careless employee. See MSHA v. El Paso Rock Quarries, 3 FMSHRC 35 (1981); Henderson v. Drilling Co., 2 FMSHRC 790 (1980).

In the instant case, MSHA does not cite the Domtar Industries case or the cases cited by Judge Broderick in support of a strict liability theory. MSHA's brief simply states that the use of explosives has been considered areas where strict liability concepts are specifically applicable, and concludes that the language of section 77.1303(h) incorporates the strict liability principals applicable to blasting and its requirements". MSHA argues that the mere fact that the blast victim was not clear of the area where flyrock fell and the blaster and his crew were not clear of the area where flyrock fell is sufficient to impose liability under section 77.1303(h).

I agree with the position taken by Austin Powder Company in its posthearing arguments that before MSHA can establish that all persons were not cleared from the blast area, it has the burden of first establishing what that area is. As correctly pointed out by Austin Powder's counsel in his brief, MSHA has attempted to establish the "blast area" in its citation. First, MSHA maintains that the blast area was an area within 500 feet of the actual blasting location, and it arrives at this distance by relying on a State of Pennsylvania regulation which only requires that machinery within 500 feet be shut down and that persons retreat to a safe distance.

area" should be in this case border on fantasy. It seems to me that when one is dealing with regulations concerning explosives and blasting, the standards sought to be invoked by MSHA should be clearly and precisely drawn and applied by the inspectors in the field so that they are readily understood by those being regulated, as well as those who have the enforcement responsibility for insuring compliance. The theories advanced by MSHA in this case are different from those recently advanced in another blasting case concerning a mine operator in Pennsylvania, and a discussion of that case follows.

On August 25, 1982, I issued a decision in the case of MSHA v. Rockville Mining Company, Docket No. WEVA 82-10. The case concerned an allegation that a Pennsylvania mine operator failed to clear and remove miners from a blasting area in violation of section 77.1304(h). Even though the mine was located in Pennsylvania, MSHA made no mention of an 500 foot requirement or absolute liability, and the inspector who issued the citation, as well as a second inspector who was a qualified MSHA explosives instructor, said absolutely nothing about any 500 foot "safe distance" requirement. In fact, the instructor gave an opinion that based on the size of the charge in the two bore holes in question, 130 feet was a safe distance, and the inspector who issued the citation rendered an opinion that if all of the holes in question were charged with 800 pounds of explosives each, a safe distance would be 2,000 feet away. In short, in the Rockville Mining case, the question as to what constituted the "blasting area" was dependent on a number of variables, such as the amount of explosives used, the number and depth of the holes which constituted the "shot", the topography, and the expertise of the blaster.

On the facts of the instant case, I conclude and find that in order to establish a violation of the first specification noted in the citation MSHA must establish by a preponderance of the evidence that Austin Powder failed to insure that persons within the "blasting area", as that term is defined by section 77.2(f), were not cleared or removed prior to the blast. I reject MSHA's "absolute liability" theory, and I also reject the notion advanced by MSHA that the mere fact that the blast victim and the blaster and his crew were in an area where flyrock fell is sufficient to impose liability under section 77.1304(h). In order for this standard to make any sense at all, it seems to me that it has to be interpreted rationally and consistently. "Hindsight" and after-the-fact interpretation for the purpose of laying the blame on someone for an unfortunate accident do not in my view advance the interests of safety, particularly when the standard in question is obviously being inconsistently applied and interpreted.

mine operators to follow directions. In my view, if MSHA believes such state requirements should be followed then it should promulgate an appropriate standard and say so. Here, although MSHA fixes the "blasting area" by measuring the distance where the farthest rock fell, it is in a position that 500 feet was a safe distance for people to be. If the distance had only gone 100 feet, that would have fixed the "blasting area", and MSHA would probably still insist that miners be cleared to a distance of 500 feet. I simply cannot accept such contradictory interpretation of the applications of the cited standard, and I reject MSHA's "500-foot

While I agree with the argument that the blaster in this case has a duty under section 77.1304(h), to locate anyone who happens to be in the "blasting area" prior to the shot and to insure that he is removed from the area, I disagree with MSHA counsel's argument that the blaster has such a duty even though he may not be able to visually observe the location of a person prior to the shot (Tr. 34-35). I conclude and find that, under the definition of the term "blasting area", the blaster has a duty to take reasonable and prudent measures to insure that all persons are cleared and removed from the "blasting area" as reasonably and safely as determined by him at the time of the shot, and not as determined by MSHA experts after the fact.

In the instant case, MSHA conceded that the procedures followed by the blaster were technically correct. MSHA found nothing wrong with the manner in which Mr. Lucas loaded, wired, and fired the shot. From the record here established, at the time the citation was issued, Mr. Bixler filled out an "Inspector's statement" in which he candidly acknowledged that the accident could not have been predicted and that it resulted from circumstances beyond the operator's control. Mr. Bixler filled out a new statement at the direction of his supervisor and the statement from the solicitor's office made a "lawyer's judgment" that the citation could not be defended on its merits. Mr. Bondra candidly admitted at the hearing that the sketch of the "blasting area" as shown in the investigation report was a mistake.

Mr. Lucas testified that he and his crew were positioned 500 feet from the blast, and he confirmed that in determining what was the "blasting area", he takes into consideration the size of the area, the manner in which it is loaded, and the surrounding terrain. On the day in question, he determined that the shot would go in the opposite direction from where he and his crew were located, but that for an unexplained reason there was a "blowout" which caused the flyrock to travel in the direction of the question.



ts of the shot or the "blowout". Mr. Bixler conceded that at the time he issued his citation he did not take into account Mr. Lucas' opinion that 300 feet was a safe distance from the blast, and he also conceded that Mr. Lucas did have the safety of his crew in mind prior to the blast.

Mr. Lucas testified that prior to the "blowout" he had made five other shots using the same amount of explosives and that there was nothing unusual about those shots. Under the circumstances, he obviously had no reason to believe that a "blowout" or flyrock would occur, and he confirmed that prior to the detonation of the shot, he checked all of the charged holes for potential signs of a "blowout". Further, as indicated earlier in my findings concerning the sounding of the warning, Mr. Lucas did all that was reasonably possible to alert persons within the blasting zone of hazard to shut down all equipment and to seek shelter.

I conclude and find that Austin Powder Company has established by preponderance of the evidence adduced in this case that prior to the occurrence of the blast in question, Mr. Lucas acted in a reasonable and prudent manner in securing the area, and that he removed himself and his crew to a safe distance and to a location which he reasonably believed was outside the "blasting area" as defined by section 77.2(f). I also conclude and find that Mr. Lucas acted in a reasonable manner in clearing other persons from the blasting area, and that he did all that could be expected of a reasonable and prudent blaster to insure that all persons, including the accident victim, were outside the blasting area. Under the circumstances, I conclude that MSHA has failed to establish a violation and that portion of Citation No. 1041342, which charges Austin Powder with failing to remove and clear all persons from the blasting area, is UNFOUNDED.

#### Illegal failure to provide suitable blasting shelters

Citation No. 1041342 also charges Austin Powder with a failure to provide suitable blasting shelters. Section 77.1303(h) requires that persons be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or shock from blasting. The regulations do not specify what a "suitable blasting shelter" is, and this matter is apparently left to the discretion and judgment of the blaster.

MSHA's counsel asserted during the course of the hearing that the citation was issued in part for failure to remove persons from the scale house, a location which counsel asserts was inside the blasting area (Tr.

suitable shelter and that the failure to remove personnel from the location also constituted a violation of section 77.1303(h).

I take note of the fact that nowhere in the official MSHA investigation compiled by Inspector Bondra is there any mention of the fact that the scale house was not a suitable shelter, or that the failure to remove persons from that location concerned the inspector. I take note of the fact that the conditions or practices described by Inspector Bondra on the face of his citation do not even mention the scale house or anyone in it as part of the alleged violations or practices. His citation is limited to an assertion that the victim was not removed to a safe area, and his conclusions were obviously based on the fact that the accident victim sustained injuries as a result of being struck by flyrock. Since the citation was issued after the investigation was completed, and since it was based on information which came to the inspector's attention in the course of that investigation, one would think that the inspector would have included the "scale house theory" in the citation. I believe the failure to do so stemmed from the fact that at that point in time, the inspector did not believe that the scale house was in the blasting area, and he did not believe that the inclusion of the scale house personnel during the hearing was an after-thought to bolster MSHA's theory of "blasting area".

Although Mr. Lucas conceded that there were no designated shelters at the location of the shot, a drill rig, a shot truck, the driller's maintenance truck were present and he considered them to be suitable blast shelters (Tr. 67-69). However, in his opinion, if the men are at a safe distance there is no need for them to be under the equipment. As for himself, he conceded that he was not under any piece of equipment because he believed he was at a safe distance. 300 feet from the actual blast operating his detonating device. In light of the fact that he believed he was at a safe distance, Mr. Lucas was of the opinion that a blaster must be able to observe the blast to detect any misfires and to insure that the proper blasting takes place. Mr. Doan testified that the scale house was in the blasting area and that a rock would not penetrate the roof. He also testified that the crusher is constructed of structural steel and was a shelter.

Inspector Bondra conceded that a piece of equipment could not be an adequate blasting shelter, and he confirmed that the drill rig was some thirty feet from where Mr. Lucas was standing at the time of the detonation would be a shelter. Even though he indicated

I have some difficulty in comprehending precisely what MSHA's position is with respect to the alleged failure by Austin Powder to provide the type of shelter contemplated by the second sentence of section 77.1303(h). I suspect that the inspector decided to include this specification in his citation after determining during his investigation that Mr. Lucas was standing some thirty feet from the drill rig and was not under it when debris from the blast went over his head. Since the inspector apparently did not determine where the rest of the crew was positioned, I have no way of knowing what he had in mind with respect to the rest of the crew.

As I interpret the cited standard, if suitable blasting shelters are provided, there is no requirement that persons be cleared and removed from the blasting area. Conversely, if persons are not within the blasting area, there is no logical reason for requiring suitable blasting shelters. The language of the standard leaves much to the imagination, and I suspect that this is the reason for MSHA's anemic argument which appears at pg. 4 of its brief as follows:

\* \* \* the fact that there were some trucks inside the blasting zones at the time of the blast is not a substitute for specifically designating and providing suitable shelters for the protection of miners. Unless the miners are trained in using shelters and know where the designated shelters are, they do not serve their intended purpose.

On the facts of this case, it would appear that the fatality which occurred prompted the inspector to conclude that suitable shelters were not provided. However, a fatality, in and of itself, does not establish a violation of any mandatory safety standard. On the facts of this case, I cannot conclude that MSHA has established by a preponderance of any credible evidence, that Austin Powder failed to provide suitable shelters. To the contrary, I conclude and find that the evidence establishes that suitable shelters, within the language of the cited standard, were in fact provided. If MSHA chooses to penalize a mine operator or its independent contractor everytime a fatality occurs, without regard to whether or not the facts presented justify such a course of action, then I suggest it seriously consider completely outlawing blasting or the use of explosives. Or in the alternative, promulgating standards which make sense. I conclude and find that MSHA has failed to establish that suitable shelters were not provided, and that portion of the citation which alleges that were not provided IS VACATED.

was served on Austin Powder Company after the inspection. The blaster Lucas was not under a suitable shelter because debris from the blast in question flew over his head while he was standing some 100 feet from a drill rig which the inspector believed constituted a suitable shelter. Here, since the victim was struck and killed by flyrock while apparently sitting on a spoil pile observing the blast, the inspector concluded that a suitable shelter was not provided, and that the victim was not cleared and removed from the blasting area.

For the same reasons articulated in my findings and conclusions concerning Austin Powder's alleged failure to provide suitable blasting shelters or to remove persons from the blasting, I conclude and find that MSHA has failed to establish violations of the part of responsibility of Doan Coal Company. I find that Doan Coal took all reasonable steps to remove persons from the blasting area prior to the detonation. When the call came over the mine radio communications system, the loader operator Albert Bloom, signaled the victim to shut down the crusher, and was seen by Mr. Bloom the victim was walking on the road in the direction of the scale house. I conclude that the victim must have known of the impending blast since he shut down his equipment and apparently intended to go on a frolic of his own to the coal spoil pile to view the results. Under these circumstances, I conclude that Doan acted reasonably, and that no requirement that a mine operator take a physical inventory of its personnel and lead them individually to a safe shelter, I can conclude that Doan Coal Company could have done anything else to prevent the tragic accident which occurred in this case. Under the circumstances, the specification in the citation charging Doan Coal Company with failure to remove all persons from the blasting area IS VACATED.

With regard to the charge that Doan Coal Company failed to provide suitable blasting shelters, I conclude and find that the primary responsibility for providing such shelters fell on Austin Powder. MSHA's attempt to hold Doan Coal Company responsible after the fact on the theory that the scale house was not a suitable shelter and did not have a sign posted on the door identifying it as such is rejected. If MSHA believes that a mine operator should label every piece of equipment or building as a "blast shelter", similar to those buildings labeled "civil defense shelter" to be used in the event of a nuclear holocaust, then MSHA should promulgate some standards and guidelines in this regard. The specification noted in the citation is also VACATED.

#### ORDER

In view of the foregoing findings and conclusions, MSHA's p

  
George A. Koutras

Administrative Law Judge

ion:

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**AUSTIN POWDER COMPANY**

Dated 19th May 1981

the manufacture and sale thereof, but to assist the said customer, the said AUSTIN POWDER COMPANY has agreed, at the request of said customer, to permit said customer the temporary use, free of charge, of the services of said company's employees, together with certain needed equipment.

Agreement shall continue in force until either party notifies the other, in writing, of its desire to terminate the Agreement. Such termination shall not relieve either party of any liability arising thereunder prior to such termination.

Dawn Carol Lamprey

By 202/17 17

**PINK - CUSTOMER'S COPY**

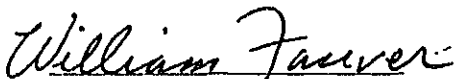
YELLOW - GALESMAN'S COPY

SECRETARY OF LABOR,	:	Complaint of Discharge, Discrimination
on behalf of	:	or Interference
ANTHONY HERIGES, TOM ANTONINI,	:	
ANTHONY GIBSON and LARRY HALEY,	:	Docket Nos. KENT 80-14-D
Complainant	:	KENT 80-15-D
	:	KENT 80-22-D
	:	KENT 80-23-D
v.	:	KENT 80-42-D
	:	KENT 80-52-D
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

FOR GOOD CAUSE SHOWN, the Secretary's motion to withdraw his complaint in each of the above cases is GRANTED.

WHEREFORE IT IS ORDERED that the above proceedings are DISMISSED.

  
WILLIAM FAUVER, JUDGE

Contribution Certified Mail:

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Company, 2355 Harrodsburg Road, PO Box 11430, Lexington, KY 40575

William Combs, Esq., UMWA, 900 15th St., NW, Washington, DC 20005

WESTMORELAND COAL COMPANY,	:	CONTEST OF ORDER
Contestant	:	
v.	:	Docket No. WEVA
	:	
SECRETARY OF LABOR,	:	Order No. 88689
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY P
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA
Petitioner	:	A.C. No. 46-015
v.	:	
	:	
WESTMORELAND COAL COMPANY,	:	
Respondent	:	
	:	Eccles No. 6 Mi

### DECISION

Appearances: John A. MacLeod, Esq., Crowell & Moring, Washington for Westmoreland Coal Company;  
Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Before: Judge Melick.

These consolidated cases are before me pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. seq., "the Act", to contest an order of withdrawal issued to the Coal Company (Westmoreland) under § 104(d)(1) of the Act and for civil penalty proposed by the Mine Safety and Health Administration for the violation charged in that order. 1/ The order before me (No.

1/ Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also



The fall occurred in an area of "old works" last mined in the 1930's the old No. 2 Entry of the two southwest main section. A work crew : supervision of section foreman Robert Hairston, was sent to the sec- Friday, January 8, 1982, and again on Monday, January 11, 1982, to pre build a stopping needed to maintain required ventilation. On the latt e crew arrived on the section around 4:30 p.m. Hairston first perform ed examination of the work places and then assigned duties to the ers. In the sequence of operations, the continuous mining machine wa mmed to the last open crosscut, left, connecting southwest main with l entry of the old inactive two north haulway. Albert Honaker, the erator, proceeded to clean rock and coal from the mine floor across th ide entry. While working there, Honaker observed what he described a 2/ at the top of the No. 2 entry that protruded from the left rib som

ntd.) danger, such violation is of such nature as could signifi- ly and substantially contribute to the cause and effect of a . or other mine safety or health hazard and if he finds such ation to be caused by an unwarrantable failure of such operator :omply with such mandatory health or safety standards, he shall ude such finding in any citation given to the operator under . Act. If, during the same inspection or any subsequent inspec- of such mine within 90 days after the issuance of such cita- , an authorized representative of the Secretary finds another ation of any mandatory health or safety standard and finds i violation to be also caused by an unwarrantable failure of i operator to so comply, he shall forthwith issue an order re- ing the operator to cause all persons in the area affected by i violation, except those persons referred to in subsection (c) e withdrawn from, and to be prohibited from entering, such i until an authorized representative of the Secretary deter- s that such violation has been abated.

Virginia State Coal Mine Inspector Danny Graham, testifying on behal erator, explained that the terms "brow" and "overhanging rib" are ess nymous. Both terms were used in this case to describe the same phe nd I conclude that the terminology is indeed synonymous.

Arthur Burdiss, a roof bolter helper on Hairston's crew that recalled being warned by Honaker of the "overhanging brow" in the entry. Burdiss estimated that the brow protruded some 10 to 12 feet of the rib. He and his co-worker, George Ayers, also tried to pull the brow with the slate bar but they too were unsuccessful. They were unable to bolt into the overhanging brow because of the position of the roof bolter canopy. Four roof bolts were, however, installed to within 10 feet of the outby edge of the brow.

Jim Milam was working with the deceased just before the roof fell. Milam unloaded the supplies needed to build the stopping and Milam examined the roof to determine where to locate the stopping. At this same time, Hairston and Honaker were continuing in their efforts to take down the brow. According to Milam, it projected 12 to 14 inches into the entry and had a "hairline crack" or separation in it. He recalls commenting that it looked like a nail and asked if it had been checked. Milam and the deceased then attempted to pull the brow down. Because of their inability to pull it down with the slate bar, Milam thought it was safe and both men began to work on the brow.

3/ There is some divergence of opinion regarding the size of the brow. The operator's witnesses who actually saw it before it fell described it as protruding from 10 to 14 inches from the rib along 4 to 6 feet into the entry. The MSHA inspectors, basing their estimates on the amount of material left after the fall, thought the overhang would have been 22 feet long and 12 inches thick, and with a brow of up to 68 inches. West Virginia Mine Inspector Graham, testifying for the operator, estimated, based on his observations, that the brow had projected 30 to 31 inches into the entry. In considering the testimonial discrepancies in the size of the brow to be used for purposes of this decision.

4/ Mr. Hairston, the section foreman, declined to answer questions relating to the subject matter of this case citing as grounds therefor the right of self-incrimination afforded by the Fifth Amendment to the U.S. Constitution. Counsel for the operator could give no assurance that Hairston would not be subject to criminal prosecution based on the subject matter of this case and did not contest his right of self-incrimination privilege. No inferences have been drawn from Mr. Hairston's refusal to answer questions in this regard based on his invocation of the Fifth Amendment.

to it than he initially thought.

As a preliminary matter, Westmoreland claims that the regulatory standard cited, 30 CFR 75.202, is unenforceably vague as applied to the facts of this case. The standard provides as relevant herein that "overhanging or loose ribs shall be taken down or supported." Westmoreland appears to argue that because an MSHA inspector testified that he would not necessarily cite every overhanging rib (for example, a one inch overhang) that in his opinion it posed no hazard, enforcement of the standard was therefore based upon the subjective discretion of the various inspectors. Westmoreland also cites in support an internal MSHA memorandum which provides in essence that overhanging ribs should be cited only when they present a hazard (Government Ex. No. 2). In determining the constitutional validity of a regulatory standard where challenged for vagueness, however, the language of the standard itself must first be examined. In this regard I find that the language provides constitutional "reasonable certainty" and is indeed facially unambiguous. Accordingly, MSHA enforcement practices under the standard are irrelevant to the defense asserted. See Mathews v. General Construction Co., 269 U.S. 385, 391; Boyce Motor Lines v. United States, 342 U.S. 337.

Westmoreland next argues that the brow which fell did not constitute an "overhanging rib" within the meaning of the cited standard. As previously stated, however, West Virginia State Coal Mine Inspector Danny Graham testified on behalf of Westmoreland that the terms "brow" and "overhanging rib" were essentially synonymous. The terms were used in this case by counsel and various witnesses to describe the same phenomenon and I have already concluded that the terms are indeed synonymous. It is accordingly immaterial whether the cited phenomenon is referred to as a "brow" or "overhanging rib". I find that the phenomenon was, regardless of the terminology used, an "overhanging rib" within the meaning of the cited standard.

Westmoreland further contends that a violation of the cited standard could not be supported where "every means of taking down or supporting an alleged overhanging rib was either infeasible or presented a potential hazard equal to or greater than the hazard presented by that overhanging rib." The contentions involve elements of two affirmative defenses, i.e. impossibility of performance (compliance) and the "greater hazard defense". In order to establish the first defense, the operator must prove that (1) compliance with the requirements of the cited standard either would be functionally impossible or would preclude performance of required work, and (2) alternative means of employment or protection are unavailable. See Diamond Roofing Company, Inc., 80 OSAHRC 76-36 (1980); A OSHC 1080, 1980 CCH OSHD ¶ 24,274 (Feb. 29, 1980); Secretary v. Sewell Co., 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir. 1982). In order to establish the latter defense, the operator must prove that (1) the hazards

elements of either the impossibility of compliance or the "great defense.

It has not been shown for example that it was necessary in stance to have required the miners to have erected a stopping or hanging brow. Evidence has not been presented to demonstrate that it could not have been erected in a safer location or that other alternatives of meeting the ventilation requirements were unavailable. Even if it is conceded, that such alternatives were unavailable, Westmoreland has not shown that it would have been more hazardous to have supported or taken down the brow.

MSHA apparently concedes that the overhanging roof in this case reasonably have been blasted down or supported with roof bolts (copy on the roof-bolting machine would not allow the machine to bolt the subject brow) and that posts or crib blocks could not have been used because of the angle of the brow (Government Ex. No. 4, page 4). It contends, however, that the overhanging roof could have been cut down by a continuous mining machine. There is no dispute that no efforts were made to do this. Westmoreland concedes, moreover, that the continuous miner could have been brought in parallel to the old No. 2 entry if additional roof bolts had been first provided in the entry. It contends, however, that on the basis of the angle of the brow, the ripper heads of the miner might have come in contact with roof bolts located in close proximity to the brow, causing possibly tearing down part of the roof. Westmoreland's argument fails to take into consideration that the continuous miner could have been used to trim the brow just ahead of the roof bolting operation. Thus, the miner could have progressed alternately with the roof bolter, cutting the brow without the ripper head of the miner ever being in close proximity to the inserted roof bolts.

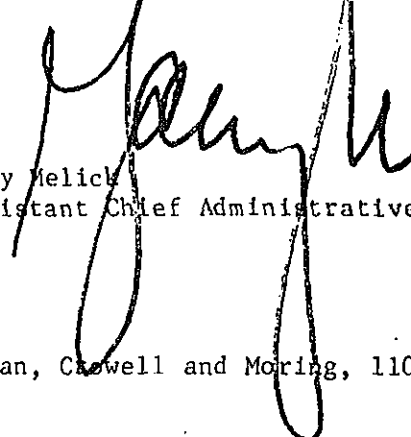
Westmoreland also contends that the brow was beyond the reach of the ripper head and therefore the miner could not have been used to bring down the brow. Westmoreland ignores the evidence, however, that the miner could have been used to cut the brow into blocks that would have given the ripper head sufficient support to have reached the brow. While Westmoreland also claims that it would have been safe to have placed roof bolts in the area between the last crosscut and the second last crosscut in the old No. 2 entry in order to support the brow, no specific safety problems have been cited. To the contrary, MSHA inspector Homer Gross opined that the continuous miner could have been safely used to bring down the brow. Under all the circumstances, it is concluded that Westmoreland has not met its burden of proving either the "impossibility of compliance" defense. The cited violation is sustained.

ed in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 at 825. The test essentially involves considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. Even considering only the testimony from the operator's witnesses, it is clear that a substantial overhanging brow existed in the cited entry in which at least a hairline fracture or separation could have been observed. According to these witnesses, the brow protruded from 10 to 31 inches from the rib for as long as 22 feet of the entry. Even had the fracture or separation not been observed, Westmoreland's expert witness, Dr. Syd Peng, concluded that fractures may very well exist that are not visible. In addition, the overhanging brow in this case was sufficiently obvious to have attracted the attention of at least six experienced miners who were sufficiently concerned to have made efforts to bring it down with a slate bar. It may reasonably be inferred that all of these miners, at some point in time, perceived the overhanging brow as a serious hazard. Under all the circumstances, I conclude that the operator presented a high probability of serious or fatal injuries. There is a reasonable likelihood that the hazard of a roof fall would occur, resulting in injuries of a serious nature. Accordingly, I find the violation to have been "significant and substantial". For the same reasons, I find that the violation reflected a high level of gravity.

I further find that the violation was the result of the unwarrantable failure of the operator to comply with the law. A violation is the result of "unwarrantable failure" if the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Co., 7 IBMA 280. In this case, the negligent acts of section foreman Robert Hairston are attributable to the operator. Secretary v. Ace Drilling Co, Inc., 2 FMSHRC 790 (1980). It is undisputed in this case that Hairston had been warned about the overhanging brow issue, had seen the condition, and had apparently deemed it sufficiently safe to have made efforts on his own to bring it down with a slate bar. The existence of this brow as described by the operator's own witnesses clearly constituted a violation of the cited standard. It may reasonably be inferred, therefore, that Hairston had knowledge of the violative condition but failed to correct that condition through indifference or lack of reasonable care. Zeigler Coal Co., supra. The violation was accordingly the result of the unwarrantable failure of the operator to comply with the law and, indeed, of gross negligence. Accordingly, I affirm the order at bar.

In determining the amount of civil penalty that is appropriate in this case, I also consider that the operator is large in size, that it has a fairly substantial history of violations, and that the penalty here imposed would not impair its ability to stay in business. Within this framework of evidence, I find that a penalty of \$8000 is appropriate.

30 days of the date of this decision.



Gary Melick  
Assistant Chief Administrative

Distribution: By certified mail.

John A. MacLeod, Esq. and Orin H. Kutinplan, Chowell and Moring, 110  
Avenue, N.W., Washington, DC 20036

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of I  
Wilson Boulevard, Arlington, VA 22203

S J. FRAZIER,

Complainant,

v.

ON-KNUDSEN, INC.,

Respondent.

COMPLAINT OF DISCRIMINATION

DOCKET NO. WEST 81-329-D

ances:

y Overfelt, Esq.  
Petroleum Building  
lings, Montana  
for Complainant

l K. Madsen, Esq.  
7 Washington Avenue  
den, Colorado  
for Respondent

: Judge John J. Morris

### DECISION

omplainant Charles J. Frazier, (Frazier), brings this action on his  
half alleging he was discriminated against by his employer,  
on-Knudsen Company, Inc., (MK), in violation of the Federal Mine  
and Health Act of 1977, 30 U.S.C. § 801 et seq.

ne applicable statutory provision, Section 105(c)(1) of the Act, now  
ed at 30 U.S.C. 815(c)(1), in its pertinent part provides as  
s:

No person shall discharge or in any other manner discriminate  
against ... or otherwise interfere with the exercise of the  
statutory rights of any miner ... because such miner ... has  
filed or made a complaint under or relating to this Act, in-  
cluding a complaint notifying the operator or the operator's  
agent, or the representative of the miners ... of an alleged  
danger or safety or health violation ... or because such miner  
... has instituted or caused to be instituted any proceeding

The threshold issues are whether complainant, as a management supervisor, is within the coverage of the Act and, further, whether the complaint was timely filed.

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

#### COVERAGE

Respondent contends that complainant does not come within the coverage of the Act since he is a member of management.

The uncontroverted facts establish that complainant was employed as safety specialist in respondent's surface coal mine operation (Tr. 99, 199). The answer to the coverage issue is found in the Act itself where "miner" is unambiguously defined as any individual working in a coal or other mine, Section 3(g). Management personnel working in a coal mine are therefore "miners" within section 105(c)(1) and they are accordingly entitled to the protections afforded therein. Accord: Miller v. Federal Mine Safety and Health Review Commission, 687 F. 2d 194, (7th Cir August 1982). Eagle v. Southern Ohio Coal Company, 2 FMSHRC 3728, December 1981 (Merlick, J.). Herman v. IMCO Services, 4 FMSHRC 1540, August 1982 (Morris, J.).

The motion to dismiss for lack of coverage is denied.

#### TIMELY FILING OF COMPLAINANT

MK asserts the complaint of discriminatory discharge was not timely filed. The discharge occurred on April 28, 1981 and the first notice MK received was when Frazier filed his amended petition in this case on August 25, 1981, approximately four months later.



On May 12, 1981, in the process of investigating his discrimination complaint, MSHA took a 12 page handwritten statement from Frazier (Commission File).

On June 15, 1981 MSHA advised Frazier that on the basis of their investigation they concluded that no violation of Section 105(c) had occurred. On July 14, 1981 Frazier appealed to the Commission. On August 26, 1981 an "amended complaint" was filed before the Commission alleging Frazier was unlawfully discharged on April 28, 1981 for engaging in a protected activity.

## DISCUSSION

It has been held that none of the filing deadlines in the discrimination section of the Act are jurisdictional in nature. Christ v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979), Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539, (1981).

All of the above facts indicate that Frazier was pursuing his discrimination complaint in a timely manner. To support MK's argument was to exalt form above substance.

The motion to dismiss for untimely filing of the complaint is denied.

## COMPLAINANT'S EVIDENCE

Complainant's evidence consists of the testimony of Charles J. Frazier, Jewell Davisson, and numerous exhibits.

Charles J. Frazier was employed with Morrison-Knudsen as a safety supervisor 2 on April 24, 1979 (Tr. 14, 19, 56). He was terminated April 28, 1981 (Tr. 14). Frazier's initial assignment was at the MK mine in Kemmerer, Wyoming. At that location Frazier reported to Gary Kilstrom, senior safety supervisor (Tr. 58). Frazier's relationship with Kilstrom developed into a personality conflict (Tr. 58). Frazier was not as severe as Kilstrom (Tr. 62-63).

Frazier was subsequently transferred to the MK Absoloka Mine in Billings, Montana where he worked under Jed Taylor, mine manager (Tr. 1). He also reported to Richard Daly in the home office. Daly was in charge of safety and environmental services (Tr. 19).

In February 1980, Frazier was restricted to his office (Tr. 141).

In September 1980 MK had a ground control problem in pit No. 27-28). MSHA inspector Clayton issued a citation and told Taylor (manager) what he expected to be done (Tr. 28). Taylor made the "that's the way the Good Lord meant it to be and there wasn't no could do to change it." Frazier felt this was a poor safety attitude behavior (Tr. 28).

In September 1980 Frazier reported an unsafe condition to W (mine superintendent) in pit No. 4 (Tr. 33). Wunderlick told Frazier wasn't to be in the pit (Tr. 33).

In December 1980 Frazier gave a company safety citation to Lix in a local bar (Tr. 89, 158). The union complained and Taylor was stating that company business shouldn't be conducted in a bar (Tr. 101). Frazier said he'd apologize to Lix for giving it to him in a bar but wouldn't apologize for the citation. He told Taylor he could "e (101).

On one occasion Taylor told Frazier that his [miner] training was inadequate (Tr. 35). Frazier felt the Company's facilities and teaching aids were inadequate. Frazier made requests for teaching aids but none arrived until he ceased to conduct miner training which was about 12 months before he was terminated (Tr. 37). Frazier received no money from his supervisors and no aids except a projector (Tr. 37). The text books he had were those he had brought from MSHA (Tr. 38).

Frazier and Doug Harper, an MSHA inspector, have a personal conflict. On one occasion Frazier flunked Harper in a mine rescue exam. Harper felt Frazier didn't have sufficient education in safety (Tr. 40).

In December, 1980, and January, 1981, Frazier was aware that Local 400 of the Operating Engineers were negotiating a labor contract (Tr. 40-41). Frazier hadn't made his union preference known to others except about a year before his discharge he told Chaps Lix that

act between the unions) (Tr. 81, 82).

Frazier went to the home office in Boise in midwinter, 1981 (Tr. 41). Taylor said Frazier was being sent to the home office because of a letter (Taylor) had received from the Operating Engineers (Tr. 76).

On April 7, 1981 Frazier talked to Dean Gilson in the home office. Taylor told Frazier he'd have to get along with Taylor or his career would be in jeopardy (Tr. 44, 45). Frazier replied he wouldn't take any guff off Taylor and "to hell with his career" (Tr. 44-45). Frazier isn't overly concerned about Taylor (Tr. 149).

On April 8, 1981 Frazier told fellow safety supervisor Barnett that he would stay in the home office for the course but to go to MSHA (Tr. 46).

On April 10, 1981 <sup>1</sup>/ Frazier was transferred to the swing shift. Frazier was told that Barnett was going to do the training. Frazier wasn't qualified and Frazier agrees he wasn't qualified (Tr. 47).

On April 11 Frazier went to the home of MSHA inspector Dick Clayton. There he listed 12 violations (Tr. 45, 46). [A detailed analysis of the violations is set forth, infra, pages 13-14.] An MSHA inspection took place on April 24, 1981 (Tr. 47).

At this time Frazier posted the NLRB election decision on the union bulletin board (Tr. 96, R3).

On April 28, 1981 Taylor called Frazier to the office and accused him of firing one union over the other (Tr. 105). Frazier said he wanted Taylor as his accuser. At this juncture Taylor terminated Frazier (Tr. 105). Taylor then told Taylor he hadn't seen the last of him. Further, he said he would turn MK into MSHA. In addition, Frazier said he had filed a grievance action complaint (Tr. 107).

---

Taylor's testimony is that he was put on the straight swing shift on April 10, 1981 but the manager's memorandum of transfer is dated April 10, 1981. Frazier was already on the swing shift and management's directive was that the shift would be "non rotating". I accordingly consider April 10th, 1981 as the first date Frazier knew he would continue on the swing shift.

Frazier's first assignment was at the Kemmerer, Wyoming mine reported to Gary Kilstrom (Tr. 407, 417). Problems with Frazier at Kemmerer Mine included tardiness, an odor of alcohol, and failure to wake up (Tr. 418).

MSHA inspector Doug Harper, a safety trainer, first inspected Frazier in 1979. He evaluated the training and except for first aid he concluded that the miner training was insufficient (Tr. 175-180). Charles Frazier was conducting the training (Tr. 76). Harper prepared a written report which was dated December 18, 1979 (Tr. 178, 179, R7). The final report's conclusion was issued on January 9, 1981 by Walter R. Schell, MSHA administrator located in Denver, Colorado (Tr. 178, R7). The MSHA report states, in part, that use should be made of the large body of instructional materials, visuals, films and tapes available (R7).

Harper had never received any training from Frazier although he spent four to five hours monitoring Frazier's class as an observer (Tr. 186, 195).

On May 31, 1979 Bruce Zimmerman, MK's training manager, in an interoffice memorandum to his supervisors reviewed the on going training and program development to meet the requirements of MSHA at that time (Tr. 357, R13). The memorandum states in part: "In addition Charles [Frazier] has a vast resource library of overheads, handouts and other training material" (R13, Tr. 367, 368).

Dean Gilson, MK's manager for safety and training, asked that Frazier's report be withheld until MK could improve its training (Tr. 426). Zimmerman was sent to work with Frazier in an effort to change his negative comments on his performance (Tr. 427). At a meeting on January 10, 1980, Zimmerman related the feelings of George Herman and Doug Harper (company personnel) to Frazier (Tr. 364). Zimmerman further suggested that Frazier should be less confrontive and less antagonistic. Frazier agreed (Tr. 365). About the first of December, 1980, the local union, Operating Engineers Local 400, was negotiating with the company over the new labor contract (Tr. 322). At this time workers complained to David Camden, a union steward, about Frazier's efforts to influence union representation at the mine. Frazier was advocating that the MK workers weren't getting representation from Local 400. Further, Frazier was advocating that Local 400 should be kicked out and the workers should join the United Mine Workers (UMW) (Tr. 261, 332). There were approximately 15 such complaints over an eight to ten month period (Tr. 264-266). David and Mike Pascal reported these conversations to David Whempner, president of Local 400 (Tr. 226, 232-233, 263). At that time Whempner contacted mine manager Jed Taylor, who suggested that the matter be tabled for a later date.

ing the company policy that MK was to remain neutral between the two. Frazier was present at the January 6, 1981 meeting. Whempner, a official and Taylor, mine manager, identified Frazier at the meeting (-208, 276-277).

Week or two later Camden told Whempner that Frazier and Lix had been argument in a bar about the union. At that time Frazier wrote x a company safety violation in a local bar (Tr. 235). Lix brought tion to Camden. Whempner in turn went to the mine and "raised th the Board of Adjustments and threatened Jed Taylor with an NLRB labor charge. Specifically, the stewards had been telling Whempner zier was telling everybody that Local 400 had given away over half labor contract. In addition to "raising hell" with Jed Taylor contacted his boss, Vince Bosch, in Helena, Montana and "raised th him (Tr. 238). Bosch indicated that unfair labor charges would by Local 400 against MK (Tr. 240). [No such charges were in fact ed (Tr. 241).]

ce Bosch, Whempner's boss, contacted Burge (Industrial Relations after Whempner complained. The problems ceased. Frazier was ily transferred to the home office in Boise, Idaho on January 28, re he remained until March 10, 1981 (Tr. 241, R1). Problems for resumed when Frazier returned to the mine (Tr. 241-242).

er he returned from Boise Taylor assigned Frazier to the second r. 468). The shift assignment was no different from any other nt (Tr. 468). The notice to Barnett and Frazier dated April 10, tes "It is not beneficial to have rotating shift in the Safety nt at this time because of our busy schedule and various activities training sessions and meetings. Therefore, we will continue to on "straight" shift until further notice. Should you have any on this, please do not hesitate to call me" (R2).

the meantime the United Mine Workers had petitioned the NLRB ng an election between the UMW and Local 400 (R3). The order g the election was entered on April 13, 1981 and the notice was ampamed as received by MK on April 16, 1981 (R3). Shortly thereafter Edward Camden called Whempner and told him that Frazier was passing the notice of the election at the mine site and urging the miners to the "right outfit" (Tr. 243, 401-403). Whempner "raised hell" -245). Whempner's complaint were that Frazier was passing the notice around in the lunchroom and change room (Tr. 248). The

the NLRB order and he said they should vote for the right outfit so they can get some representation out there" (Tr. 403). At this time the work shift was in the lunchroom (Tr. 403).

Whempner again tried to get Frazier removed and he called Burge, (Industrial Relations), who told him to review the problem with mine manager Jed Taylor (Tr. 209-210, 246).

Robert Wunderlick, the mine superintendent, told Taylor that Frazier was in the lunchroom with the [NLRB] petition. Further, he related to Taylor that Frazier was claiming the contract was no good, that there was going to be a new election, and that everything that had been done was no longer good (Tr. 469-470). Taylor called his superiors in Boise who asked him to immediately fire Frazier. Taylor said he wouldn't fire Frazier until he verified the report of Frazier's activities (Tr. 470-471). Taylor asked Wunderlick to double check the facts. He did. Camden told Wunderlick that Frazier had presented the paper to the workers (Tr. 210-216). Taylor had called his supervisors at the home office because home office concurrence is necessary to discharge a safety supervisor (Tr. 410). Burge, (Industrial Relations) and Dean Gilson, manager of safety and training, concurred with Taylor that his decision to terminate was appropriate (Tr. 210-216, 435-436).

Frazier was called to the office on the same day and terminated without union involvement and for not following instructions (Tr. 470-471). Frazier had been told three or four times to remain neutral (Tr. 474, 486-487). Frazier asked Taylor who was accusing him (Tr. 472).

When he was terminated Frazier said MK hadn't heard the last of it (Tr. 477). Taylor didn't know of any MSHA charges brought by Frazier (Tr. 478).

The safety record at the Absolka mine is excellent. It has two years without a lost time accident for 500,000 man hours (Tr. 438-440, R19). The mine incident rate is 0.0 compared with the average for the coal industry of 3.5 (Tr. 440, R20).

#### DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC (October 1980), rev'd on other grounds.

this point is appropriate to consider the status of Frazier's  
es. The vast majority of discrimination claims arising under the  
generated by miners engaged in duties other than those of a safety  
r. But I find nothing in the text of the Act nor in the  
ive history that indicates Congress intended to exclude a safety  
r from the protection of the discrimination portion of the Act. An  
's safety inspector bears an important function in helping fulfill  
oses of the Act since his duties will ordinarily seek to promote  
nd health. Under Pasula and Robinette and their progeny I conclude  
d faith complaints of unsafe and unhealthy conditions by a safety  
r in the ordinary course of his duties are protected under the

ing resolved Frazier's status we will go to the Commission's  
ruling in Robinette: to rebut a prima facie case a operator must  
her that no protected activity occurred (in view of the ruling as  
er's status MK cannot establish that defense) or that the adverse  
as in no part motivated by protected activity, 3 FMSHRC 817-818 and  
If an operator cannot rebut the prima facie case in the foregoing  
t may nevertheless defend by proving that it was also motivated by  
r's unprotected activities and that it would have taken the adverse  
n any event for the unprotected activities alone, Pasula, 2 FMSHRC  
0.

operator bears an intermediate burden of production and persuasion  
ard to these elements of defense. Robinette, 3 FMSHRC at 818 N.  
s further line of defense applies only in "mixed motive" cases,  
ses where the adverse action is motivated by both protected and  
ted activity. The Commission made clear in Robinette that the  
burden of persuasion does not shift from the complainant in either  
case. 3 FMSHRC at 818 N. 20. The foregoing Pasula-Robinette test  
in part on the Supreme Court's articulation of similar principles  
Healthy City School Dist. Bd. of Educ. v. Doyle, U.S. 274, 285-87

Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November  
et. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981),  
ission affirmed the Pasula-Robinette test, and explained the  
g proper criteria for analyzing an operator's business justifica-  
adverse action:

charter nor the specialized expertise to sit as a superior grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper question pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives proper legal analysis ..., then a limited examination of its substance becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have discharged the miner. Cf. R-W Service System Inc., 243 NLRB 1204 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved a limited analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, the Commission held that if it is determined that a business justification is not pretextual, the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its judges, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. The Commission recently stated "our function is not to pass on the fairness of such asserted business justifications but rather on whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belv  
4 FMSHRC 982, 993 (June 1982).



was receiving complaints from the union official. After this Frazier was transferred to the home office. Taylor, the mine superintendent told Frazier he was being transferred because of complaints by Local 400. Proving of unsatisfactory conduct is one of the criteria mentioned in Bradley v. Belva Coal Company. I accordingly conclude MK's business justification is clearly credible. Having made that determination the next issue is whether MK was motivated as claimed. Yes. The mine manager he about Frazier's actions involving the NLRB petition. He had the facts verified by Wunderlick and Frazier was terminated that very afternoon. In the midst of two unions struggling to represent its workers company neutrality would be normal practice. In short, Frazier was fired for violating MK policy.

Frazier's post trial brief asserts that MK discriminated against him when he was transferred to the swing shift and thereafter terminated.

A vital element of a prima facie case is a showing that adverse action was motivated in any part by the protected activity. If there is no direct evidence then the Commission suggests four criteria to be utilized in analyzing the operator's motivation with regard to adverse personnel action. This criteria includes knowledge of the protected action, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment of the complainant, Johnny N. Chacon v. Phelps Dodge Corporation.

Guided by the above case law we will review Frazier's initial contention that he was transferred because he was overzealous in the enforcement of safety regulations. I disagree with Frazier's position. I do not find it credible, and no evidence supports the view, that MK waited until April 1981 to take adverse action against Frazier for events in March 1980 (dust sampling program), in September 1980 (problems in pit #4), and in December 1980 (citation issued in a bar). 2/

In short, there is no coincidental timing as required by Johnny N. Chacon v. Phelps Dodge.

Frazier complaints about the miner training aids, even if true, could hardly have affected MK's action since Frazier had been transferred from the training duties four months before he was terminated (Tr. 37).

neither party inquired into the reason for Frazier's telephone call about April 7, 1981 (Tr. 405-444). There is accordingly no evidence establishing that Frazier was engaged in any protected activity at that date.

Frazier's post trial brief asserts that there is evidence that Wunderlick [superintendent] ordered Frazier to stay out of safety in the pit. This event apparently occurred in September, 1980. This occurred when Frazier reported an unsafe condition to Wunderlick. Wunderlick took Rob Williamson, the then senior safety officer, down to the pit. Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

This event, like the other 1980 incidents, lacks coincidence as required by Johnny N. Chacon.

Frazier's post trial brief further asserts that whenever a violation was issued Frazier was blamed for reporting the violation to MSHA. I have carefully reviewed the record and absolutely no evidence supports this proposition.

Frazier's post trial brief states there are indications that Taylor and Wunderlick were upset because Frazier went over their heads and contacted the home office about safety. Even if Taylor and Wunderlick were "upset" with Frazier the record fails to establish the prerequisite of coincidental timing.

The evidence here shows that Frazier was restricted to his quarters in March 1980. On this point I credit Wunderlick's uncontroverted testimony that this restriction came about because Frazier wasn't abiding by the rule to work out matters of safety with supervisors (Tr. 284, 296). This event occurred in early 1980 and like the other incidents, it persuaded that it generated adverse personnel action approximately one month later.

Frazier's brief argues that, although there is some dispute about the exact working, it is clear that Dean Gilson reprimanded Frazier for his "demanding attitude."

I find all of Frazier's contentions to be without merit. I do not find that Taylor's permanent assignment of Frazier to the swing shift was a cloak a discriminatory move. Taylor's stated reason was that "it is not beneficial to have rotating shift in the Safety Department at this time because of our busy schedule and various activities such as training sessions and meetings. Therefore, we will continue to operate on straight" shift until further notice." (R2). Independent facts support the operator's decision since Barnett, MK's only other safety officer at his mine, had taken over the training duties. I further credit Taylor's testimony that the shift assignment was no different involving Frazier than anyone else (Tr. 468). In short, the proffered business justification here is not plainly incredible or implausible.

It should be noted that Frazier engaged in two additional activities which have been held to be protected under the Act. One protected activity involved Frazier's complaint of discrimination filed with MSHA when he was transferred to the swing shift. But the record here fails to establish that MK knew of Frazier's complaint. If MK didn't know that Frazier had filed a discrimination complaint then that protected activity could not have influenced MK's decision to fire Frazier.

Frazier also contends he was fired because he filed safety complaint with MSHA.

An in depth review of such complaints is in order. The scenario: the day after Taylor made Frazier's swing shift assignment permanent Frazier went to the home of Howard R. Clayton, an MSHA inspector (Tr. 331-332). Frazier's complaints to MSHA's Clayton involved ground control, the mining plan, dust sampling, excessive noise, dust accumulations, oxygen deficiencies, dragline moving over miners, inadequate fire training, superintendent's mining papers, ambulance training, explosives, OSM violations for not dewatering pits, improper ground on a 280 B shovel, all lights, transformer, watering work roads, keys to electrical unit, and cords required to be kept (Tr. 331-345).

MSHA investigated and for various reasons concluded that Frazier's allegations did not support the issuance of any citations except for the alleged violation of the fire training regulations, 30 C.F.R.

On this record MK could only have learned of the MSHA safety complaints from MSHA inspector Clayton, from Barnett, or from Frazier self.

Concerning Inspector Clayton: I credit the professionalism of Clayton who observed at the hearing that it was against the law to not an operator of the identity of an informant (Tr. 346-347). Further, Clayton couldn't recall telling anyone with MK that Frazier was the informant (Tr. 345-346).

Concerning Barnett: Frazier says he told Barnett about going to M. However, no evidence establishes that Barnett communicated this informant to his supervisors. I find Barnett's testimony illustrates the situation namely "I heard from the day I walked on that mine site to [the] day [Frazier] left that at some time or another 'I [Frazier] should file charges with MSHA' or 'I'm [Frazier] going to call the feds', or 'I'm [Frazier] going to call my friends back in Pittsburgh' or whatever, and charges. That was just a rhetoric of something that went on all the time (Tr. 354).

Concerning Frazier himself: Frazier does not claim, before he was terminated, to have notified MK supervisors that he was the MSHA informant. In fact, Frazier indicates it was he who told Taylor after his termination that he was the informant (Tr. 107).

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3/ Citation 827683 alleges as follows:

There is no record or indication that the mine operator is complying with 77.1100 of the CFR, in that employees are not being instructed or trained annually in the use of firefighting facilities and equipment.

4/ Citation 827682 alleges as follows:

The opening under the Bucyrus Erie 280B shovel located in 004-0 pit do not have a guard or cover over it. This allowed access in through the front of the machine to the high voltage collector rings (4160 volts). This is a non-compliance of Article 710-44 of the 1975 National Electrical Code.

ital issue is whether MK could reasonably believe that such information was truthful. On the basis of the facts previously stated I conclude MK could have such a reasonable belief. I further find MK did not seize on these events as a pretext to cloak a discriminatory move.

Further bearing on a resolution of the credibility in this case are the facts that Frazier agrees he expressed a union preference although he claims this occurred before contrary instructions were issued by MK (Tr. 3). In addition, direct testimony confirms the event that triggered Frazier's discharge: Vandersloot testified Frazier came into the lunchroom with the NLRB order and told the men to vote for the "right outfit" so "we can get some representation out there" (Tr. 401-403). Frazier's testimony itself reflects that he had the NLRB decision (Tr. 96).

The Commission does not attempt to count witnesses but I find that Lix's evidence, a combination of witnesses from management, union, and fellow workers, has carried the operator's burden of proof as required in David Pasula. In short, I find that MK would have fired Frazier for his activities preferring one union over the other regardless of any protective activity.

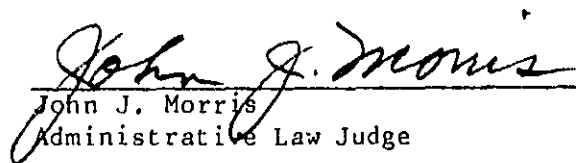
Frazier's final contention that no one from MK interviewed Chaps Lix lacks merit. There is no obligation on MK to seek out Chaps Lix especially where some 15 complaints arose about Frazier's union activities (Tr. 265). In addition, I find that union official Whempner who was the person complaining of Frazier's activities did, in fact, talk to Lix. This occurred at the same time Whempner first went to Jed Taylor in December, 1980 (Tr. 233-234).

Since no discrimination occurred in violation of the Act it is unnecessary to consider Frazier's claim for damages.

Based on the foregoing findings of fact and conclusions of law I enter the following:

#### ORDER

The complaint of discrimination is dismissed.

  
John J. Morris  
Administrative Law Judge

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	)	DOCKET NO. WEST 82-87-RM
Contestant,	)	Citation 567341; 12/3/81
	)	DOCKET NO. WEST 80-453-RM
v.	)	Citation No. 566900
	)	(Consolidated)
RY OF LABOR, MINE SAFETY AND	)	
ADMINISTRATION (MSHA),	)	MINE: Climax
	)	
Respondent.	)	
	)	

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 For the Respondent

John A. Carlson, Judge

### DECISION AND ORDER

ese two cases were consolidated for decision upon joint motion of  
 ties. Docket WEST 80-453-RM was fully tried upon the merits; WEST  
 M was not tried, but as shown in the pleadings, involves an  
 al question of law. Upon the parties' representation that the  
 ing facts were the same as those adduced at hearing in WEST 80-453,  
 ion for consolidation for decision was granted. Both cases arose  
 contests of a 104(a) citation. The citations in both cases alleged  
 on of the mandatory standard published at 30 C.F.R. § 57.20-11. It  
 s:

Areas where health or safety hazards exist that are not  
 immediately obvious to employees shall be barricaded, or  
 warning signs shall be posted at all approaches. Warning  
 signs shall be readily visible, legible, display the nature  
 of the hazard, and any protective action required.

The parties have no significant disagreement as to most of the Climax Molybdenum Company (Climax) operates a large molybdenum mine Leadville, Colorado. Radon gas is naturally present in measurable quantities in certain underground areas of the mine. The gas which emanates from uranium in the ore body or surrounding rock is not itself dangerous to miners, but as it decays it liberates radioactive particles known as radon daughters. Health authorities recognize that certain of these particles cause respiratory cancer when inhaled over prolonged periods of time. Consequently, the Secretary has promulgated a number of specific mandatory health standards regulating exposure levels to radon progeny. These are found at 30 C.F.R. § 57.5-37 through 57.5-47. These standards use the "working level" as the measurement of radon daughter exposure. <sup>1/</sup> Four working level months exposure are permitted in any calendar year under 30 C.F.R. § 50.5-38. Other standards prescribe sampling techniques, the frequency of testing, and record keeping methods. In a non-uranium mine such as Climax, 30 C.F.R. § 57.5-40 requires the operator to record the exposure received by all miners working in areas where concentrations exceed 0.3 WL.

None of the radiation standards mention smoking except for 30 C.F.R. § 57.5-41 which provides:

Smoking shall be prohibited in all areas of a mine where exposure records are required to be kept in compliance with standard 57.5-40.

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1/ The term is defined at 30 C.F.R. § 57.2 as:

... any combination of the short-lived radon daughters in one liter of air that will result in ultimate admission of  $1.3 \times 10^5$  MeV (million electron volts) of potential alpha energy, and exposure to those radon daughters over a period of time is expressed in terms of "working level months" (WLM). Inhalation of air containing a radon daughter concentration of 1 WL for 173 hours results in an exposure of 1 WLM.



computerized system for regulating miner's exposure. He also conceded the north hanging wall area, on the date of inspection, displayed a "no smoking" sign in conformity with section 57.5-41.

The Secretary contends, however, that scientific data disclose that persons who smoke cigarettes and who are also exposed to radon daughters experience a far higher incidence of respiratory cancer than do miners who do not smoke, or smokers who are non-miners. Moreover, according to the Secretary, the incidence of cancer in smoking miners who are exposed to radon daughters significantly exceeds the rate predictable from adding the incidence observable for non-smoking miners and the incidence for non-smoking smokers. In other words, the Secretary maintains cigarette smoking and radon daughter exposure interact synergistically to create significantly greater probabilities of cancer than one would expect from looking at either type of exposure alone, or from the sum of the two.

The Secretary provided evidentiary support for his position through the testimony of Victor E. Archer, M.D., Clinical Professor at the University of Utah School of Medicine. Dr. Archer, a Fellow of the American College of Preventive Medicine, has specialized in the study of the biological effects of radon daughter exposure on humans (Tr. 32). His testimony traced the history of epidemiological studies in this country and elsewhere which indicate that radon daughter exposure has a linear relationship to the incidence of cancer - the greater the exposure, the higher the respiratory cancer rate. Studies of uranium miners conducted under his direction, he testified, further showed respiratory cancer rates were higher among cigarette smokers than non-smokers where radon daughter exposures were the same. He presented a graph based upon data obtained from his uranium miner studies and those of the American Cancer Society which investigated the relationship between lung cancer and smoking.

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2/ A stipulation made during the hearing shows that radon daughter concentrations monitored in the Climax Mine during the year preceding issuance of the citation ranged from .00 to 5.77 working levels (Tr. 74-75). Respondent's exhibit 3 shows readings at various locations, including the "north hanging wall," which was the area singled out in the citation. The highest reading disclosed in the exhibit for that area was 0.33 working levels, recorded on August 11, 1980. There is no dispute as to the exhibits' accuracy.

into the data... asserted that the data establish that the "induction latent period" (the time between initial exposure and ultimate onset of cancer) was "considerably" shorter for smoking miners than for non-smoking miners (45). From the studies and his experience and training he was of the opinion that for miners exposed to radon daughter concentrations:

... the first 25 years the lung cancer rate substantially increased and that the induction latent period would be shorter among smokers. (Tr. 47.)

He further believed that this would be true for exposure levels below working level months allowed as a maximum annual exposure under the Secretary's radiation rules. In fact, according to Dr. Archer, some risk exists at any level of radon daughter exposure, and that risk would all instances be enhanced by smoking (Tr. 57-58).

In Dr. Archer's opinion, miners should be warned of the effects of smoking whenever radon daughter concentrations substantially exceed normal ambient air or "background" levels. When questioned regarding the precise concentration which should trigger a warning, he responded with this specific recommendation:

Any level one sets is somewhat arbitrary, but I would suggest that one-tenth working level would be a reasonable place (Tr. 60).

This is the proposition upon which the Secretary founds his citation. He concedes that the north hanging wall area displayed a "no smoking" sign in compliance with standard 57.5-40. Because miners who smoke cigarettes at any time or place and also inhale radon decay particles in the mine environment are especially vulnerable to respiratory cancer, the Secretary reasons that that hazard must be spelled out to miners. The standard CFR § 57.20-11, he maintains, imposes a clear duty upon Climax to post a sign wherever radon readings exceed 0.1 working levels. This is so because smoking, when combined with radiation exposure, is a health hazard "not immediately obvious to employees," in the words of the standard, thus one which must be emphasized and explained by a warning sign.<sup>3/</sup>

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<sup>3/</sup> The Secretary does not contend that Climax's duty extends beyond the giving of a warning; he has not suggested, for example, that compliance with any standard demands any sanctions against miners who smoke outside the mine.

community, he testified, as to the proof of a synergistic  
ship (Tr. 123). 4/

max also stresses an admission from Dr. Archer that the various  
which led him to his conclusions were conducted at a time before  
stringent limitations on radon daughter exposure were in effect  
Exposures of the studied miners could thus have been many times  
than those now permitted at Climax.

## II

max's basic defenses may be summarized as follows:

The evidence does not prove that risk of respiratory cancer  
ed with radon daughter exposure is increased synergistically by  
e smoking.

The plain language of section 57.20-11, together with its  
show that the standard was not intended to address hazardous  
outside the mine - including smoking at home.

A comprehensive body of regulations covers the admitted hazards  
from radon daughters. At section 57.5-41 these regulations cover  
n radiation areas. Operators are entitled to rely on these  
ns as encompassing the requirements with respect to smoking as it  
o radon daughters. Consequently, the Secretary cannot properly  
a "general" regulation such as 57.20-11 to impose a requirement  
warning against smoking at home.

## III

resolving this dispute I do not decide whether the Secretary's  
t of the combined smoking and radiation hazard is valid. Such a  
s unnecessary to reach a correct result. Therefore, for the  
of this decision, the existence of the hazard is assumed. The  
ssue presented here concerns the cited standard: Does it fairly  
the hazard perceived by the Secretary? For the reasons which  
hold that it does not.

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er, Raymond Rivera, Climax's occupational health manager at the  
eed on cross examination that there is a synergistic relation-  
97).

valid application to non-obvious safety or health hazards originating in the mine. The thrust of its claim is that a good faith reading does not fairly suggest any obligation to place warning signs in the mine concerning miners' non-work-related conduct outside the mine.

Much of the specific argument of the parties centers around the relationship between the group of standards which deal specifically with radiation, and the more general standard cited by the Secretary. Climax stresses those cases arising under the Occupational Safety and Health Act which declare that specific standards dealing with a certain subject matter must take precedence over those of a more general application. In the same vein, Climax argues that by promulgating the discrete body of radiation standards beginning at section 57.5-37, the Secretary has worked a species of preemption. Operators, that is to say, reading this seemingly comprehensive collection of standards naturally are lead to believe that they need look no further to find all the requirements for radiation protection. Climax further suggests that, other considerations aside, the plain words of the standard, speaking as they do of "barricades" in addition to warning signs, imply that section 57.20-11 was intended to apply solely to definable hazards within the posted or barricaded area. 5/

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5/ In a refinement of that argument, counsel for Climax attached to his post-hearing brief an excerpt from the proceedings of the Federal Metal and Non-Metal Safety Advisory Committee, which recommended adoption of the regulation in 1975. According to counsel, the comments of committee members show their explicit concern was the protection of miners from non-obvious hazards in underground travelways or mined out areas. The Secretary objects to this post-trial submission as an improper attempt to adduce evidence after the closing of the evidentiary record. While it is probable that the Advisory Committee's proceeding (42 Fed. Reg. 5546, 29 FR 10000 (1977)) is subject to official notice as an aid to interpretation of the standard, I give it no weight because of its content. The hurried discussion of the participants is random and superficial, giving few useful clues to the true intended scope of the standard.

the most liberal construction consistent with the constraints of s, however, Climax's arguments must prevail in this case. I am ble to conclude that a mine operator, even supposing his know- he alleged synergistic effect of smoking and radon daughter could read section 57.20-11 in conjunction with the radiation and perceive a requirement to post signs in radiation areas of o warn miners against smoking outside those areas. The stan- en together, do not fairly convey such a notion to the most d conscientious operator. This is particularly so for the reasons:

The specific radiation standards do not ignore smoking. Section dresses the matter quite clearly. As mentioned earlier, this equires simple "no smoking" signs in all mine areas where eords must be kept in compliance with section 57.5-41 (0.3 vels). This implies that the Secretary considered the combined smoking and radiation exposure, and was satisfied with this mode ion. Moreover, the Secretary predicates his case for signs ainst smoking at home on a 0.1 working level threshold. Such a ars wholly inconsistent with the 0.3 level specified in sections d 41. Operators may scarcely be expected to read section o imply the necessity for more elaborate and intensive warnings level of exposure than does the specific radiation standard ks directly to the issue of smoking.

The cited standard identifies no particular hazards. It refers [a]reas where health or safety hazards exist that are not im- obvious to employees ...." It is specific, however, concerning batement. It names but two: barricades and warning signs. This y concerning corrective measures may properly be considered in g the intended reach of the standard. Assume that a mine through its own exploration of the scientific and medical data

through such common devices as safety meeting presentations, employee safety handbook coverage, or paycheck inserts.

(3) As mentioned earlier, this decision does not purport to decide whether the Secretary correctly identifies and assesses the smoking-radiation hazard. One aspect of this issue, however, is material to efforts to determine the application of the cited standard. The Secretary's expert, Dr. Archer, was commendably frank in acknowledging he was "somewhat arbitrary" in fingering one-tenth working level as the trigger point for a warning under section 57.20-11. Nowhere does his testimony or any other evidence suggest a general agreement among experts that this, rather than some other point, is where the operator's duty should commence. As a regulated party, the operator is entitled to some concrete guidance in the scientific literature, if not the standard itself, as to the radiation level which poses a danger sufficient to necessitate worker warnings. It is likely true, as Dr. Archer suggests, that there is no "safe" radiation level; and that the minimum radiation level requiring a warning would of necessity be somewhat arbitrary. The point is, however, that under the regulatory scheme of the Act the Secretary bears the duty of determining where that level is, and making it known to mine operators. The ad hoc quality of the determination in this case is all too apparent. 6/

Climax did not violate the cited standard. The citations must therefore be vacated.

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6/ I do not fault the Secretary for his concern over the hazard which he perceives. Much of his evidence on the issue is impressive. I must suggest, however, that his effort to protect against the hazard through the existing standard was misplaced. The lack of a finite threshold radiation level for warnings illustrates the need for recourse to the rule making powers granted by the Act. Use of those powers would provide ample opportunity for a full airing of all data, the making of a decision based upon that data, and the promulgation of a clear and precise regulation

~~John A. Carlson~~  
Administrative Law Judge

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SECRETARY OF LABOR,	:	Complaint of Discharge,
MINE SAFETY AND HEALTH	:	Discrimination, or
ADMINISTRATION (MSHA),	:	Interference
on behalf of	:	
Arnold J. Sparks, Jr.,	:	Docket No. WEVA 79-148-D
Complainant	:	
	:	Shannon Branch Coal Mine
v.	:	
	:	
ALLIED CHEMICAL CORPORATION,	:	
Respondent	:	

ORDER REINSTATING DECISION AND ORDER  
OF SEPTEMBER 27, 1979

On May 20, 1982, the Commission remanded the captioned matter for "further proceedings consistent with the court's decision" in UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir. 1982), cert. denied October 12, 1982, U.S. \_\_\_\_\_.

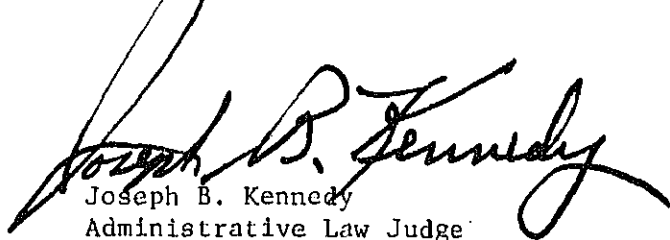
Accordingly, on July 1, 1982, the trial judge issued an order to show cause why his decision and order of September 27, 1979 should not be reinstated.

Counsel for the Secretary responded saying he had no objection to reinstatement of my finding of discrimination in Allied's refusal to pay walkaround compensation. 1 FMSHRC 1451 (1979). Counsel for the operator suggested reinstatement be stayed pending disposition of a petition for certiorari in Helen Mining et. al. The petition for certiorari was denied on October 12, 1982.

In the meantime the American Electric Power Company through its coal subsidiaries filed contests designed to provoke relitigation of the issue of the applicability of section 103(f) to "spot" inspections. Under settled principles of issue preclusion, however, and by the specific terms of the Commission's order of remand, relitigation of the issue in these matters is foreclosed.

The record shows that while its appeal was pending counsel for Allied assured the Commission that all but paragraphs 1, 2 and 6 of my order of September 27, 1979, had been obeyed. Accordingly, it is





Joseph B. Kennedy  
Administrative Law Judge

bution:

erick W. Moncrief, Esq., Office of the Solicitor, U.S. Department  
f Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

ld J. Sparks, Jr., General Delivery, Pineville, WV 24874  
(Certified Mail)

hall C. Spradling, Esq., Spillman, Thomas, Battle & Klostermeyer,  
.O. Box 273, Charleston, WV 25321 (Certified Mail)

SECRETARY OF LABOR,	:	Complaint of Discharge
MINE SAFETY AND HEALTH	:	Discrimination or Inter
ADMINISTRATION (MSHA),	:	
on behalf of Ray Gann	:	Docket No: SE 81-34-DM
and Dennis Gann	:	
Complainants	:	Young Mine
	:	
v.	:	
	:	
ASARCO, INCORPORATED,	:	
Respondent	:	

### DECISION ON CROSS MOTIONS FOR SUMMARY JUDGEMENT

All of the pertinent facts in this discrimination case have been stipulated and the matter has been presented to me on cross motions for summary judgement. At the time in question the two complainants were classified as production machine men earning \$5.43 per hour. Production machine men do the work of drilling and blasting and are paid an incentive bonus which is based upon the time they were in drilling and blasting and upon the total tonnage broken by them in a particular week.

On July 29, 30 and 31, 1980, federal mine inspector Frank [redacted] inspected respondent's mine. On the first two days he was accompanied by Mr. Ray Gann for two 8-hour workshifts and on July 31, 1980, Dennis Gann accompanied the inspector for an entire 8-hour workshift. The two complainants were paid "walkaround pay" at the rate of [redacted] machine man, and the alleged act of discrimination is they did not receive the incentive bonus that they otherwise would have earned. Section VII states:

"On the days in question all other employees in the machine man classification did drilling and blasting for their entire shifts and received incentive pay in proportion to the number of hours actually worked in machine man classification."

It is therefore clear that it cost each of the complainants a certain amount of money when they accompanied the inspector during the

"Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."

It is not necessary to resort to legislative history to determine which of these two miners did suffer a "loss of pay during the period of his participation in the inspection..." There was a violation of the Act and a citation would have been appropriate. If a citation was issued, and I do not know whether one was, then the appropriate penalty should be considered during the normal assessment procedures followed with a citation. Unless and until the Commission rules that it is appropriate to bypass the established assessment procedures, I am not going to assess civil penalties in discrimination cases. If I were to assess a civil penalty in this case, however, it would be nominal because the hazard and negligence are of such a low degree.

It is hereby ORDERED that respondent, Asarco, Inc. pay to Dennis Gann the sum of \$7.94 \*/ and pay to Ray Gann the sum of \$15.88 and that they pay interest at the rate of 10% beginning on the day when they should have received the incentive pay involved herein and continuing until payment is made.

*Charles C. Moore, Jr.*  
Charles C. Moore, Jr.,  
Administrative Law Judge

Delivery: By Certified Mail

A. Stewart, Esq., Office of the Solicitor, U.S. Department of Justice  
280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203

Dennis Gann, Riverbend Road, Mascot, TN 37806

Ray Gann, Route 3, Park Street, Strawberry Plains, TN 37871

H. Walters, Mine Superintendent, ASARCO, Inc., Highway 11-E,  
Strawberry Plains, TN 37871

Corporate Systems, 503 Gay Street, Knoxville, TN 37902

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-136-M
Petitioner	:	A.C. No. 48-01181-05040
v.	:	
	:	Sweetwater Uranium Project
MINERALS EXPLORATION COMPANY,	:	
Respondent	:	

### DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Anthony D. Weber, Esq., Los Angeles, California, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act", in which the Secretary charges the Minerals Exploration Company with one violation of the mandatory standard 30 C.F.R. § 55.9-3. The cited standard requires that "powered mobile equipment shall be provided with adequate brakes." The general issues before me are whether the company has violated the regulatory standard as alleged in the petition and, if so, the appropriate civil penalty to be assessed for violation.

I have previously determined in connection with violations alleged under the identical standard at 30 C.F.R. § 56.9-3, that the regulatory language does not provide sufficient guidance as to what is to be considered "adequate brakes." <sup>1/</sup> In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and as to its application." Connolly v. General Construction Co., 269 U.S. 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972). See Secretary v. Alabama By-Products Corporation, 4 FMSHRC \_\_\_\_\_ (December 1982).

Secretary v. Concrete Materials, Inc., 2 FMSHRC 3105 (1980); Secretary v. A.H. Smith, 4 FMSHRC 1371 (1982) rev. grntd. September 3, 1982.

On the unique facts of this case, I cannot conclude that a reasonably prudent person familiar with the factual circumstances surrounding this allegedly hazardous condition would recognize that there was in fact a hazard warranting corrective action within the purview of the cited regulation. This determination is based in part upon the failure of MSHA to have followed the standardized brake testing procedures approved by industry and accepted by MSHA. According to MSHA Inspector Merrill Wolford, brake testing standards established by the Society of Automotive Engineers (SAE) then existed for rubber-tired construction equipment such as the Michigan 280 dozer here cited (See Appendix A attached hereto). Wolford conceded that the SAE tests were the only "recognized" tests, but for reasons not made clear, he devised and followed his own testing procedures in this case which admittedly did not meet the SAE standards. 2/ By devising and using his own ad hoc testing procedures not shown to have had scientific validity or reliability, the Inspector was, indeed, exercising completely arbitrary enforcement practices.

The actual tests performed by Wolford, first on the parking brake and then on the service brakes, were described by him in the following colloquy:

A. I asked the operator to set the parking brake, to engage the transmission on the vehicle with the engine in idle speed, and then let off of the service brakes, and the vehicle moved forward with no hesitation \* \* \* then I asked the operator -- explained to him what I wanted to do: to have him back up a ways. And while he was doing that, I checked the backup alarm

2/ Wolford testified at one point that it would have been hazardous to have followed the SAE tests on the cited machine, but he also testified that he nevertheless offered to perform those tests for the operator and was prepared to do so. Wolford subsequently recanted and admitted that he did not in fact advise the operator that he would perform the SAE tests. I do not find Wolford's testimony to be credible in light of these inconsistencies.

at 3 to 5 miles an hour. Q. Now, when you signaled him to the service brake, what then occurred? A. The vehicle stopped and came to a halt -- what I estimated to be in excess of what would constitute adequate brakes -- approximately 25, 30 feet (T. 14-15).

In light of Inspector Welford's admission that his own ad procedures were not the recognized industry and MSHA procedures, Welford's testing procedures had no correlation to those recognized procedures and that no evidence has been presented to show that Welford's testing procedures have any scientific validity or reliability, I conclude that a reasonably prudent person would have recognized that the Michigan 280 loader here cited were inadequate in that they precluded warranting corrective action within the purview of 30 CFR 55.9-1.1. Accordingly, the operator was denied fair notice of any alleged violation and citation must be vacated.

Even assuming, arguendo, that the apparent partial admission by supervisor Casey Conway that the parking brakes were indeed bad (T. 3, supra) and that therefore due process problems stemming from the asserted lack of notice may be considered waived, I do not find any credible evidence of record that MSHA has in any event met its burden that the parking and service brakes on the Michigan 280 loader were indeed "inadequate". For the reasons previously stated, I find no proven testing procedures followed by Inspector Welford. In any event, no weight to Conway's apparent admissions that the parking brakes were bad in light of his testimony that he had no expertise in brake testing and that indeed he was then confused by the procedures followed

3/ Welford also claims that Casey Conway, the company safety supervisor, admitted after Welford's testing that the brakes were bad. Ordinarily, an operator has actual knowledge that a cited condition is hazardous and a claim of fair notice does not exist. Cape and Vineyard Division of the Bedford Gas and Edison Light Company v. OSHRC, 512 F.2d 1148 (1st Cir. 1975). However, Conway testified, and credibly I believe, that although he generally agrees with Welford, he was inexperienced in brake testing and that by Welford's tests and that indeed he subsequently learned in talking to his maintenance "people" that Welford's tests were indeed improper. Under the circumstances, I do not find Conway's apparent admission to be credible and, because of his inexperience in the testing of brakes, I would consider him to have been a qualified person sufficiently "familiar with the actual circumstances surrounding the allegedly hazardous condition." By-Products, supra.

...and after it was cited, that the brakes were working - real good .  
to accord significant weight to the firsthand testimony of field mechan  
arge Baker, who drove the cited dozer to the shop after it was cited.  
found the brakes to be in "very good" condition and upon inspection,  
need for repairs. In addition, inspection documents produced at hearin  
addressed by the testimony of Conway, show that the cited dozer had been  
ted to a "150 hour" inspection, including an inspection for brake adju  
t, only the day before the citation herein was issued. I find it unli  
t the cited dozer would have been returned to service with defective b  
er such an inspection.

Finally, I accept as credible the testimony of mine operations super  
one Connor that he did not personally believe that the brakes on the c  
er were defective and that he agreed to withdraw the dozer to the shop  
y to avoid an argument with Inspector Wolford. Under these circumstan  
to not consider either Connor's silence in the face of accusations by t  
pector or his agreement to withdraw the cited equipment to constitute  
sions that either the testing procedures followed by Wolford were prop  
that the brakes on the cited equipment were indeed defective. For the  
ditional reasons, then, I find that the cited standard was not violated  
s case and that Citation No. 578809 should be vacated.

#### ORDER

Citation No. 578809 is hereby vacated and this case is dismissed.



Gary Melnick  
Assistant Chief Administrative Law Judge

tribution: By certified mail.

Anthony D. Weber, Esq., Union Oil Company of California, Union Oil Center  
7600, Los Angeles, CA 90017

Bert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor  
5 Federal Building, 1961 Stout Street, Denver, CO 80294

# RECOMMENDED PRACTICE INFORMATION REPORT

J- 1152

***This material appears in the  
SAE Handbook***

**SAE** *The Engineering  
Resource For  
Advancing Mobility*

SAE, 400 COMMONWEALTH DRIVE, WARRENDALE, PA 15096



## ANCE—RUBBER-TIRED MACHINES—SAE J1152 APR80

## SAE Recommended Practice

Technical Committee, approved July 1976, editorial change April 1980. This document incorporates material from SAE J1160, which has been discontinued. Rationale statement available.

Performance criteria for service braking systems, and parking systems for off-highway, rubber-tired machines, such as scrapers, graders, cranes, excavators, and other machines, are provided in this SAE Recommended Practice (July, 1973) and J1116 (July, 1973) (Sections 4.1 and 4.2, respectively).

Braking system performance for in-service machines shall be in accordance with the standard.

Criteria by which machine braking system compliance

1. **Service Braking System**—The primary system of any type used for stopping the machine.

2. **Parking System**—The system used for stopping the machine in the

event of any single failure in the service braking system.

3.3 **Parking System**—A system to hold stopped machine stationary.

**NOTE: Common Components**—The above braking systems may use common components. However, a failure of a common component shall not reduce the effectiveness of the machines stopping capability below the emergency stopping performance as defined in paragraph 4.2.1.

### 4. Braking System Performance

4.1 **Service Braking System**—All tractor scrapers and dumpers shall have braked wheels on at least one axle of the prime mover and one axle of each trailing unit. All other machines shall have at least two braked wheels (one right hand and one left hand).

4.1.1 **STOPPING PERFORMANCE**—The service braking system, when tested in accordance with Section 5, shall stop the machine within the distance specified in the appropriate table.

4.1.2 **HOLDING PERFORMANCE**—The service braking system shall have a holding capability equivalent to holding the machine stationary on a dry swept concrete

127 000	—	—	—	11.0 (33.0)	15.8 (47.4)	21.3 (63.9)	27.8 (83.4)	35.0 (105.0)		
Brake Performance Requirements (U.S. Customary Units)										
Machine Mass, lb	Machine Speed, mph									
	4	6	8	10	12	14	16	18	20	22
	Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)									
Up to 36 000	2 (6.0)	5 (15.0)	8 (24.0)	15 (45)	20 (60)	25 (75)	31 (93)	38 (114)	45 (135)	53 (159)
Over 36 000 up to 70 000	—	—	—	19 (57)	25 (75)	33 (99)	41 (123)	51 (153)	61 (183)	72 (216)
Over 70 000 up to 140 000	—	—	—	22 (66)	31 (93)	40 (120)	50 (150)	62 (186)	75 (225)	89 (267)
Over 140 000 to 280 000	—	—	—	26 (78)	36 (108)	47 (141)	60 (180)	74 (222)	89 (267)	107 (321)
Over 280 000	—	—	—	31 (93)	43 (129)	57 (171)	73 (219)	91 (273)	111 (333)	132 (396)

grade under conditions as listed:

Machine	Grade	Condition
Loaders	30%	Loaded to manufacturer's gross mass (weight) rating and distribution. Bucket to be in SAE carry position.
Dumpers & Tractor Scrapers	25%	Loaded to manufacturer's gross machine mass (weight) rating and distribution.
Graders	30%	Cutting edge to be in the transport position.
Cranes & Excavators	25%	Unloaded, with components in the transport position as recommended by the manufacturer.
Tractors with ed. Dozer	30%	Lowest part of cutting edge to be 400 mm (16 in) above test surface.

The criteria shall apply to both forward and reverse directions.

4.1.3 **SYSTEM RECOVERY**—With the machine stationary, the service braking systems primary power source shall have capability of delivering at least 70% of maximum brake pressure measured at the brakes when the brakes are fully applied twelve (12) times at the rate of four (4) applications per minute with the engine at maximum governed rpm for dumpers, tractor scrapers, cranes and excavators; and twenty (20) times at the rate of six (6) applications per minute with the engine at maximum governed rpm for loaders, graders, and ed tractors with dozer.

4.1.4 **WARNING DEVICE**—The service braking system using stored energy shall be equipped with a warning device which actuates before system energy

drops below 50% of the manufacturers specified level. The device shall be readily visible and/or provide a continuous warning. Gauges indicating be acceptable to meet these requirements.

4.2 **Emergency Stopping System**—All machines shall have an emergency stopping system.

4.2.1 **STOPPING PERFORMANCE**—The emergency stopping system, when tested in accordance with Section 5, shall stop the machine within the distances shown in parenthesis in the appropriate table.

4.2.2 **EMERGENCY APPLICATION**—The emergency stopping system shall be applied by a person seated in the operator's seat, arranged so that it cannot be released from the operator's seat unless immediate reapplication can be made by the operator seated to stop the machine or combination of machines.

4.2.2.1 In addition to the manual control, the emergency stopping system may also be applied automatically. If an automatic system is used, the automatic application shall occur when the system is actuated.

4.3 **Parking System**—All machines shall have a parking system capable of being applied by a person seated in the operator's seat.

4.3.1 **PARKING SYSTEM PERFORMANCE**—The parking system shall be capable of holding the machine static on a concrete grade under all conditions of loading, both forward and reverse directions.

4.3.2 **REMAIN APPLIED**—The parking system shall maintain the parking performance in compliance with paragraph 4.3.1, notwithstanding contraction of the brake parts, exhaustion of the storage medium, or any kind.

24	32	40	48
Service Brake Maximum Stopping Distance—Metres (Emergency Brake Maximum Stopping Distance—Metres)			
10.9 (27.1)	17.0 (46.2)	26.5 (70.4)	36.0 (99.5)
14.2 (31.6)	22.3 (52.1)	32.1 (77.7)	43.5 (108.5)
19.2 (38.1)	29.0 (60.9)	40.4 (88.7)	53.5 (121.6)
24.2 (44.9)	35.6 (69.9)	48.8 (99.9)	63.5 (135.0)

Brake Performance Requirements (U.S. Customary Units)

Machine Speed, mph			
15	20	25	30
Service Brake Maximum Stopping Distance—Feet (Emergency Brake Maximum Stopping Distance—Feet)			
36 (90)	59 (153)	88 (234)	122 (330)
47 (103)	74 (173)	106 (258)	144 (360)
64 (126)	96 (202)	134 (294)	177 (403)
80 (149)	118 (231)	161 (331)	210 (448)

**Criteria**  
**Test Facilities and Instrumentation**  
 The test course shall consist of a clean swept, level, dry concrete or asphalt surface of adequate length to conduct the test. The approach shall be of sufficient length, smoothness, and uniformity of grade to assure a constant travel speed of the machine. The braking surface shall not have over a 1% grade in the direction of travel, or more than 3% grade at right angles to the direction of travel.

The instrument to measure the stopping distance with an accuracy of  $\pm 5\%$  of actual distance.

The instrument to measure the test speed with an accuracy of  $\pm 5\%$  of actual speed.

The instrument for determining the machine mass (weight).

The instrument for measuring the braking system energy level as required in paragraphs 5.2.1.3 and 4.1.1.

The instrument for measuring the force required by the operator to actuate the braking system.

**Requirements**

Tests to be conducted with the applicable braking system fully engaged.

Stopping tests to be conducted under the following conditions:

Condition	Condition
Unloaded, with bucket in SAE carry position	

Machine Mass, kg	24	32	40	48
Service Brake Maximum Stopping Distance—Metres (Emergency Brake Maximum Stopping Distance—Metres)				
Up to 45 000	10.9 (27.1)	17.9 (46.2)	26.5 (70.4)	36.0 (99.5)
Over 45 000 to 90 000	17.6 (36.0)	26.8 (58.1)	37.6 (85.1)	43.5 (108.5)
Over 90 000 to 180 000	25.9 (47.1)	37.9 (72.9)	51.5 (103.7)	63.5 (135.0)
Over 180 000	37.6 (62.7)	53.4 (93.6)	71.0 (129.6)	88.8 (199.9)

Brake Performance Requirements (U.S. Customary Units)

Machine Speed, mph			
15	20	25	30
Service Brake Maximum Stopping—Feet (Emergency Brake Maximum Stopping Distance—Feet)			
Up to 100 000	36 (90)	59 (153)	88 (234)
Over 100 000 to 200 000	58 (119)	89 (192)	125 (282)
Over 200 000 to 400 000	86 (156)	125 (241)	171 (344)
Over 400 000	124 (207)	177 (310)	235 (429)

5.2.3 Stopping distance to be measured in metres (feet) from the point at which the brake control is applied to the point at which the machine stops.

5.2.4 Stopping tests to be conducted from at least one speed for each machine as listed:

Machine	Speeds
Loaders, Tractors with Dozers	Not less than 26 km/h (16 mph) or maximum speed if less than 26 km/h (16 mph).
Dumpers, Tractor Scrapers	Not less than 32 km/h (20 mph) or maximum speed if less than 32 km/h (20 mph).
Graders	Not less than 30 km/h (18 mph) or maximum speed if less than 30 km/h (18 mph).
Cranes, Excavators	Not less than 32 km/h (20 mph) or maximum speed if less than 32 km/h (20 mph).

5.2.5 Stopping test shall be conducted with the transmission in the lowest gear and the speed required in paragraph 5.2.4. The power shall be disengaged prior to completing the stop.

5.2.6 Auxiliary retarders shall not be used in the test unless the machine is simultaneously actuated by the applicable brake system control.

5.2.7 Maximum allowable operator forces to actuate braking system shall be as follows:

Appearances:

Mr. Walter Joe Blanc  
722 Hemlock Drive, Grand Junction, Colorado 81501  
Appearing Pro Se

Peter R. McLain, Esq., Wilson, Brown & Faulk  
P.O. Box 4611, Houston, Texas 77210  
For the Respondent

Before: Judge John J. Morris

DECISION

Complainant Walter Joe Blanc, (Blanc), brings this action on his behalf alleging he was discriminated against by his employer, Brown and Root, (B&R), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, codified at 30 U.S.C. 815(c)(1), in its pertinent part provides as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

evidence is generally without substantial conflicts. Complainant's evidence seeks to prove he was fired because he detected and the abatement of substandard mining practices by Gilbert Western, Inc., a subcontractor. Respondent's evidence seeks to establish a justification for discharging complainant. The proffered evidence arises from incidents of unprotected activity.

### COMPLAINANT'S EVIDENCE

Complainant Joe Blanc testified on his own behalf:

Blanc was employed by B&R on September 24, 1981 (Tr. 8). Wayne Pierce, a supervisor, offered him the position of safety supervisor at \$2400 a month (Tr. 9, 12). Pierce also offered Blanc additional employment opportunities (Tr. 9). Blanc had 10 years experience as an MSHA coal mine supervisor (Tr. 13, 14, 16).

Blanc was, in fact, hired as a safety inspector at \$14.50 an hour (Tr. 11). After two or three weeks he was told he would not receive the supervisor's position (Tr. 20, 54). Blanc was terminated on October 3, 1981 (Tr. 8).

Blanc's duties included the inspection of the work areas of Tectonic Construction, Summit Construction, and Gilbert at the Colony Shale Oil

These companies were all subcontractors of B&R, the general contractor (Tr. 19, 20, 22).

After he started Blanc found explosives and dynamite scattered around the work area (Tr. 22). Prior to this time Blanc detected many unsafe conditions (Tr. 23, 61). He kept a daily list of these substandard conditions which he gave to William Minton, his supervisor, when he was terminated (Tr. 24).

Other personnel would become outraged on almost every substandard condition Blanc would point out to them (Tr. 25). Blanc discussed such conditions with Gilbert supervisors Reseigh, Schnopp, Burkey, or Neff (Tr. 25). At least five substandard conditions would be corrected each day (Tr. 25).

After he was terminated Blanc prepared an additional list of these conditions. The list, only partially complete, contains fewer

4. Safety equipment check card not filled out on the triple boom drill (C1). This was discussed with Reseigh or Schnopp but they didn't get too upset (Tr. 29).

5. Battery lid cover loose and unsecured on triple boom drill (C1). This would have been discussed with Gilbert's mechanic, Minton. Minton didn't get upset like the rest of them (Tr. 30).

6. No fire extinguishers on triple and double boom drills, no air compressors, and oil storage station (C1). This condition was discussed with Schnopp (Tr. 30).

7. Inoperative backup alarm on crane (C1).

8. Broken roof glass in crane (C1). This condition and the preceding one were discussed with mechanic Minton who didn't get out of hand (Tr. 30, 31).

9. From October 19, 1981 to November 3, 1981 tagline was not used on suspended equipment (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31). They got upset and aggravated (Tr. 31).

10. October 19, 1981 to November 3, 1981 workmen were observed standing below suspended load (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31).

11. Paper, aluminum cans, and other trash was scattered throughout the area (C1). Reseigh and Schnopp were not upset over this condition (Tr. 32).

12. The truck carrying explosives: it lacked a cover lid for tonometers, it was not identified as one carrying explosives, and it was not blocked to prevent motion. Smoking was observed within ten feet of the truck (C1). This was discussed with Reseigh. He was angry and upset but took care of it right away (Tr. 32).

14. No smoking signs were not placed on the truck carrying diesel fuel (C1). This was discussed with Schnopp or Bill Milton (mechanic)(Tr. 33). Blanc didn't think this was abated (Tr. 33).

15. Diesel fuel was stored in two 5 gallon containers (C1). Blanc discussed this with Schnopp but couldn't recall his reaction (Tr. 33).

16. A backhoe and front end loader were taken into the tunnel without emissions control for the diesel exhaust (C1). This situation was discussed with Reseigh or Schnopp who tried to convince Blanc that the equipment had emissions controls (Tr. 33).

17. The lunchroom was cluttered with tin cans and paper trash (C1). This condition was discussed with Schnopp who didn't seem to get upset (Tr. 34).

18. The roof in the tunnel was not supported in an area about six feet wide and ten feet in length (C1). Blanc discussed this with Reseigh who became outraged. Blanc had a copy of the ground support plan Reseigh through up his hands, replied with an obscenity, and left the property like a wild man (Tr. 34, 43). Schnopp with whom Blanc also discussed this was upset because they'd have to put in ground support (Tr. 44). The roof support incident happened the same day Blanc was terminated (Tr. 43, 61).

In the three and one half weeks Blanc was on the Gilbert site the conditions not abated were the roof support problem [No. 18] and the brass in the crane [No. 8] (Tr. 60). Blanc didn't know if the roof supports were installed since this incident occurred on the day of his termination (Tr. 61).

Minton terminated Blanc on November 3, 1981 between noon and 3 p.m. (Tr. 35). Minton said he was terminating Blanc for his failure to get along with the contractor. Minton said he couldn't go around "putting fires" (Tr. 30). At this meeting no statements were made about Blanc's safety complaints issued against Gilbert nor was there any discussion about Blanc's job activities (Tr. 38, 40, 41). At the termination conference Minton said Blanc was in his hair and he (Minton) had only been there a while (Tr. 41).

On two prior occasions Blanc's supervisor, Minton, had told him to make it easy on Gilbert because they had a hard money contract (Tr. 41). Hard money, according to Blanc, means they don't want any slowdown (Tr. 41).

stop the van, get out, and take care of the situation (Tr. 62). That Blanc meant he was going to "knock him on his ass" (Tr. 62-63). That was not Blanc's normal approach to problems although he did get upset with safety director Dave Allen over a flagrant violation (Tr. 63).

On another occasion, after the van incident, Blanc noticed part of his lunch was missing from his lunchbox. Blanc didn't say anything until he checked with his wife (Tr. 65). The next morning he held his only safety meeting. At the meeting he told the Gilbert employees that whoever got into his lunchbox would need an ambulance, i.e., Blanc was going to "knock them on their ass" (Tr. 65, 66).

## RESPONDENT'S EVIDENCE

Respondent's witnesses were William Minton (B&R safety director), Walter Saunders (Blanc's immediate supervisor), Gary Bates (Exxon's mining superintendent and client's representative), and Bob Reseigh (Gilbert project manager).

Witness William Minton testified as follows:

As B&R's safety director, he was responsible for safety and health of the Colony Shale Oil Project (Tr. 94, 95). Blanc was responsible for the bench area (Tr. 96). Blanc was hired as a safety inspector at \$14.50 an hour because of his knowledge about MSHA and mining practices (Tr. 106).

Minton explained to Blanc that he shouldn't shut down Gilbert for non-serious violations (Tr. 111). B&R could be back charged for this and it would affect productivity (Tr. 111). Blanc was counselled on two different occasions because of complaints by Reseigh (Gilbert project manager) and Gary Bates (Exxon manager) (Tr. 111).

Minton first heard about the middle of October from Vance English that Gilbert was being shut down for improperly marked gas cans and for working on top of a trailer (Tr. 112, 113). Minton went up to the mountain and didn't see anything that would cause a shutdown (Tr. 113-114).

It is B&R policy that if a safety inspector sees employees in a situation of imminent danger he has the authority to shut down the operation (Tr. 115). Various remedies are available to the inspector (Tr. 116-117). Minton did nothing about this particular complaint (Tr. 117-118).

It was over two weeks later when Reseigh came to Minton and said that the employees were being harassed by Blanc and shut down for no reason at all (Tr. 119). Minton's investigation showed nothing serious that should cause



Blanc, Bills, and Reseigh were talking. Bills brushed against Blanc automatically took offense. He put his fists up and told Bills he never touch him again (Tr. 122). Minton talked to Bills and , but not Blanc, about this incident (Tr. 123).

On November 3 Gates came to Minton about a shutdown (Tr. 124-125). Minton felt Blanc was abusing his authority as an inspector (Tr. 125).

At his termination meeting Minton told Blanc he had no alternative but to terminate him for failure to get along with the subcontractor (Tr. 125). Blanc was quiet. He did not deny the lunchbox, the van, and the Bills incidents (Tr. 125). Blanc's discharge slip reads that he was fired for failure to get along with the subcontractor (Tr. 145-146).

Minton's first counselling session with Blanc was after Reseigh complained about Blanc shutting Gilbert down. The second session was over two hours Blanc was to work. The fourth session was after the Bills incident. This was on the date of termination (Tr. 128). There were five counselling sessions before Blanc was terminated (Tr. 129). The fifth and final session was on the day Blanc was fired (Tr. 129). Minton never discussed Blanc's job nor did he at any time tell him not to note or report violations or defects (Tr. 129, 133-134).

Minton learned of the incident involving roof supports in the tunnel on November 3 after Blanc had been terminated (Tr. 135). Bates and Reseigh of Parachute (Colorado), after Blanc had left, and explained they had ordered additional bolts (Tr. 135). Reseigh said this was not an imminent situation although bolts were required in the drawings (Tr. 135). Minton hadn't talked about the bolts at the termination meeting (Tr. 135). Minton, as to Blanc being terminated Minton didn't have any knowledge of the reasons or conditions for which Gilbert was cited (Tr. 158-159).

Minton never told Minton he was having problems with the subcontractors (Tr. 161).

Blanc's termination on November 3, 1981 was triggered by the complaints of the subcontractor, the client, and the [disregard by Blanc of] counselling sessions. The final straw was the lunchbox incident (Tr. 161).

Witness Walter Saunders testified as follows:

Walter Saunders was Blanc's supervisor (Tr. 163). Saunders returned from leave on October 26. At that time Minton informed him that there were some problems on the mine bench. Some animosity had developed between Gilbert and Blanc. Gilbert was complaining they were being shutdown

Dave Allen's complaints were that Blanc was either shutting down the operation or threatening to do so when it wasn't justified (Tr. 177).

Blanc was terminated because of his inability to talk with sub-contractors and because he was abrasive (Tr. 179, 180). It is improper for an inspector to threaten someone with bodily harm (Tr. 182).

Witness Gary Bates testified as follows:

He was the representative for Exxon USA, and as such he was responsible for the day to day operation of the Colony Shale Oil Project (Tr. 184).

Joe Blanc first came to Bates' attention shortly after Gilbert mobilized (Tr. 188). A series of statements were made to Bates which he considered to be overzealousness on Blanc's part (Tr. 189). It was not so much what Blanc said but how he stated it (Tr. 189). Blanc was using abusive language and a tough guy attitude (Tr. 190). Bates asked Minton straighten this out (Tr. 190).

About a week later the Bills incident (when Bills brushed against Blanc) was brought to Bates' attention (Tr. 191). Bates contacted Minton because he was concerned about a fight (Tr. 191). Minton told Bates he'd talk to Blanc (Tr. 191).

Another matter brought to Bates' attention was the lunchbox incident which Bates describes as Blanc "lining up" the Reseigh group and saying he'd send them off the hill in an ambulance if it happened again (Tr. 192). Bates told Minton this conduct is "completely unacceptable and we can't have that" (Tr. 192). Minton said he'd look into it and try to get it resolved (Tr. 192).

Bates never made any recommendation concerning Blanc's personnel status (Tr. 192).

Tr. 213-215). Gilbert had a fixed price contract where Gilbert was paid in lineal feet of tunnel (Tr. 213).

Reseigh and Blanc disagreed over the way things should be done. Blanc would note violations and bring them to Reseigh's attention (Tr. 214, 215). Basically Blanc wanted it corrected now (Tr. 215). It was Gilbert's position to correct, if possible (Tr. 215).

On several occasions Blanc shutdown several pieces of equipment for not having fire suppressors. MSHA did not require such suppressors (Tr. 215-217). Reseigh complained to Bates (Tr. 216-217).

About a week or 10 days later they were about 40 to 50 feet into the access tunnel (Tr. 219). Blanc wanted ventilation. Reseigh hesitated because subsequent blasting would blow it up (Tr. 219). Reseigh went to Bates and told him they could legally advance 100 feet (Tr. 219). Bates agreed. Reseigh didn't know if Blanc had shut down the tunnel (Tr. 219).

Blanc called a safety meeting and threatened to carry some people off the mountain because a sandwich was missing from his lunchbox. Reseigh told Saunders about it. Reseigh felt they couldn't have that kind of animosity on the site (Tr. 220).

On one occasion [November 3] Blanc said Gilbert couldn't drill. The plan called for rock bolts in back of the rib (Tr. 221). Normally such bolts are installed behind the Jumbo (Tr. 222). The Jumbo was pulled out, a truck brought in, and Gilbert installed the roof bolts (Tr. 222). Reseigh went down and talked to Bates and after lunch they both went to Minton to get a parachute, some 16 to 20 miles from the job site (Tr. 222).

Reseigh said something had to be done about Blanc (Tr. 222-223). Blanc was told that something had been done (Tr. 222-223).

Reseigh's workers were instructed to get along with Blanc (Tr. 223-224).

On one occasion Bills was talking with his hands and he touched Blanc who got "stiff". Blanc told Bills not to touch him again, that he did not like to be touched. He was not belligerent but there was no question he didn't want to be touched (Tr. 226-227). Bills is 5 foot, 7 inches tall and 68 to 75 years old (Tr. 227). [At the hearing the Judge observed that Blanc appears taller and younger than Bills].

On one occasion Blanc wanted all work to cease in the tunnel face during blasting operations (Tr. 230). When Gilbert blasts in a tunnel t

Reseigh only complained twice about Blanc. The first instance was that Blanc was inspecting them unnecessarily for trivial problems. On the day Blanc was no longer assigned to the mine bench Reseigh wanted to be sure the problem had been taken care of so he went to see Minton (Tr. 24

## DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall, 663 F 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co. FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Pasula 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC 817-818.

At this point it is appropriate to consider the status of Blanc's activities. The vast majority of discrimination claims arising under the Act are generated by miners engaged in duties other than those of a safety inspector. I find nothing in the text of the Act or in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfill the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I conclude that good faith complaints of unsafe and unhealthy conditions by a safety inspector in the ordinary course of his duties are protected under the Act.

Having resolved Blanc's status we will go to the Commission's further ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Blanc's status B&R cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 N. 20. If an operator cannot rebut the prima facie case in the foregoing manner it may nevertheless defend by proving that it was also motivated by the miner's unprotected activities and that it would have taken the adverse action in any event for the unprotected activities alone, Pasula, 2 FMSHRC 2799-2800.

operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained. The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). If it appears that a proffered business justification is at plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action is "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality comes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrower statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-4 (1979) (articulating an analogous standard).

C at 2516-17. Thus, the Commission first approved restrained an operator's proffered business justification to determine if it amounts to a pretext. Second, the Commission held that once it is determined that a business justification is not pretextual, then the

approved once offered. Rather, the Commission intends to encourage, carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co  
4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the defense asserted by B&R. The defenses are succinctly stated by Blanc's supervisor Minton. Blanc was terminated because of complaints by the subcontractor (Gilbert), the client (Exxon), and the counselling sessions. The final straw was the lunchbox incident (Tr. 159). B&R in its post trial brief also argues that the Bills and the van incidents support B&R's business justifications.

We will examine the record. Gilbert's complaints: Manager Reeseigh complained twice. Once was over being unnecessarily inspected over trivial problems (Tr. 247). The second time was apparently when Reeseigh went to see Minton himself (Tr. 247). At that point Blanc had already been terminated.

The client's complaints: Exxon, through its manager Gary Bates, asked Minton to "straighten out" Blanc's attitude. Bates dislikes an attitude of "I am not here to help your safety program, I'm here to shut you down" (Tr. 190).

Further complaints by the client arose from the Bills incident. Bates was concerned about a fight and again contacted Minton (Tr. 191).

Bates describes the lunchbox incident as Blanc "lining up" Reeseigh's group (Tr. 192). Bates admonished Minton stating "that type of behavior is completely unacceptable and we can't have that" (Tr. 192).

Three complaints by a client-owner in less than a three week period would motivate Minton to fire Blanc. A miner's unsatisfactory past work record is one of the criteria discussed in Bradley v. Belva Coal Company.

On the basis of the Commission directives I conclude that the business justification is not pretextual and the reasons were enough to have legitimately moved B&R to take adverse action against Blanc.

I have carefully examined Blanc's evidence. A cursory review might indicate that his facts establish a claim of retaliatory conduct. The scenario: Blanc has been overzealous in enforcing safety regulations

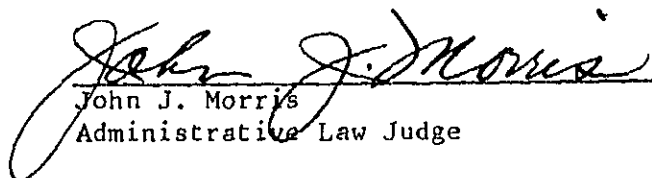
Minton generally did not know about Blanc's disagreement over conditions with Gilbert personnel nor about the roof bolt incident. Minton could not have motivated Minton to fire Blanc.

the evidence fails to establish a case of discriminatory conduct under the Act it is unnecessary to consider Blanc's claim of lost expenses.

on the foregoing facts and conclusions of law I enter the

ORDER

complaint of discrimination is dismissed.

  
John J. Morris  
Administrative Law Judge

on:

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